Supreme Court, U.S.
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No. 87-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELISA CHAN, et al.,

Petitioners,

vs.

KOREAN AIR LINES, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 23, 1987
CERTIORARI GRANTED APRIL 4, 1988

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Chronological List of Relevant Docket Entries

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Multidistrict Litigation Docket No. 565

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

DATE	FILINGS—PROCEEDINGS
11/17/83	CERTIFIED copy of OPINION and ORDER from Judicial Panel on Multidistrict Litigation transferring thirty-two (34) pending actions to the District of the District of Columbia, assigned to Honorable Chief Judge Aubrey E. Robinson, Jr. for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. 1407; Schedule A.
	* * *
2/17/84	MOTION by pltfs' for partial summary judgment against Korean Air Lines; Statement of Material Facts; Appendix A and B; Affidavit in Support; Memorandum; Table of Authorities; Exhibits 1 thru 7.
3/23/84	STATEMENT of Points and Authorities of Korean Air Lines Co., Ltd. in opposition to plaintiffs' motions for partial summary judgment; table of contents; exhibits A thru N; Rule 56(f) Affidavit; Statement of genuine issues; affidavit of Abraham L. Meilen, exhibit A.
4/6/84	NOTICE of Filing amendment to Plaintiffs' Steering Committee's motion for partial summary judgment.
4/6/84	REPLY by pltfs Steering Committee to the opposition of Korean Air Lines to pltfs motions for partial summary judgment; Table of Authorities; Exhibits A thru D.

4/13/84 MOTION of deft Korean Air Lines Co., Ltd. for leave to file a Sur-Reply statement of points and authorities in opposition to plaintiffs' motion for partial summary judgment and request for expedited treatment; Stipulation; Statement of points and authorities.

4/18/84 ORDER filed 4/18/84 that deft. KOREAN AIRLINES CO., LTD., may serve and file a Sur-Reply Statement of points and authorities in opposition to pltfs' motions for Partial Summary Judgment by May 4, 1984. Robinson, C.J.

4/19/84 RESPONSE by Pltfs Steering Committee's statement in response to deft Korean Air Lines motion for leave to file a Sur-Reply Brief.

5/4/84 SUR-REPLY statement of points and authorities of deft KAL in opposition to pltfs' motion for partial summary judgment.

2/28/85 MOTION of pltf (against KAL only) for Partial Summary Judgment heard, argued and taken under advisement. Robinson, C.J.

3/12/85 POST argument supplemental statement of P&A's by deft KAL in opposition to pltfs' motion for partial summary judgment, exhibits A thru C.

4/1/85 TRANSCRIPT of proceedings on 2/28/85, pp 1-63. Robinson, C.J.

7/25/85 MEMORANDUM AND ORDER that pltfs' motion for partial summary judgment against deft Korean Air Lines Co., Ltd. is denied; and it is, further ordered, that Korean Air Lines Co., Ltd. is entitled to avail itself of the limitation on damages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and it is, further ordered, that pltfs may not receive immediate payment of $75,000, there being material issues of fact with respect to the amount of unliquidated damages. (See for further details) Robinson, C.J.

8/2/85 AMENDED ORDER to amend the Court's order of July 25, 1985, and the reasons stated therein, it is by the Court this 1st day of August, 1985, Ordered, that the claims in the above-captioned complaints against Korean Air Lines are dismissed. Robinson, C.J.

8/29/85 NOTICE of pltfs of motion to amend court's memorandum and order to certify appeal of defective ticket issue; memorandum in support. (filed 8-23-85).

9/12/85 REPLY of pltfs to deft Korean Air Lines opposition to pltf's motion to certify appeal of defective ticket issue.

9/24/85 CERTIFICATION FOR APPEAL under 28 U.S.C. section 1292(b) that the issue disposed of by this Court's Memorandum and Order of July 25, 1985, which held that Korean Air Lines is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets, involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Robinson, C.J.

9/24/85 ORDER that the July 25, 1985 Memorandum and order of this Court is hereby amended to add that the part of the Memorandum and Order which denies the pltfs' motion for partial summary judgment against Korean Air Lines on the defective ticket issue and holds that Korean Air Lines is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may

materially advance the ultimate termination of the litigation. Robinson, C.J.

4/09/86 ORDER (copy) filed 4-8-86 in USCA granting Plaintiffs' Steering Committee leave to appeal pursuant to 28 U.S.C. 1292(b).

4/09/86 ORDER (copy) filed 4-8-86 in USCA directing Clerk, USDC, upon payment of docketing fee, to transmit preliminary record to USCA in No. 85-5982.

2/03/87 ORDER (copy of) filed 1-30-87 in USCA remanding record for clarification. (Record returned to file room).

2/27/87 SUPPLEMENTAL memorandum of points and authorities by Korean Air Lines Co., Ltd. pursuant to order remanding record for clarification.

3/27/87 MEMORANDUM by pltfs.' Steering Committee in response to KAL memorandum regarding order remanding record for clarification.

5/8/87 MEMORANDUM. Robinson, C.J.

5/8/87 ORDER filed 5/7/87 directing that memorandum and order of 7/25/87 shall apply to these actions.

5/11/87 ORDER continued: ACTIONS: 83-3448, 83-3450, 83-3454, 83-3457, 83-3458, 83-3459, 83-3463, 83-3465, 83-3466, 83-3469, 83-3470, 83-3473, 83-3792, 83-3890, 83-3898, 83-3902, 83-3903, 84-0029.

* * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 85-5982

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

DATE	FILINGS—PROCEEDINGS
(B) 10-02-85	4-Appellant's petition for permission to appeal pursuant to 28 U.S.C. § 1292 (b) (p-26)
(B) 10-02-85	Docketing statement was mailed to counsel for appellant
(G) 10-15-85	4-Appellee's opposition to petition for permission to appeal pursuant to 1292(b) (m-14) [#23]
(G) 10-22-85	4-Appellant's reply to opposition to petition for permission to appeal pursuant to 1292(b) (m-22) [#23]
(G) 03-24-86	4-Petitioners' motion to expedite determination of leave to appeal pursuant to 28 U.S.C. § 1292(b)
(E) 04-08-86	Per curiam order that the motion to expedite determination of the petition for leave to appeal is granted. The petition to leave to appeal pursuant to 28 U.S.C. 1292(b) is granted. The district court has properly found that the requirements of 28 U.S.C. 1292(b) are satisfied, and wise exercise of our discretion dictates that the appeal be allowed. The following briefing schedule shall apply: Appellants' brief and record excerpts—May 7, 1986; Appellee's brief—June 6, 1986; and Appellants' reply brief, if any—June 23, 1986. The Clerk is directed to transmit a certified copy of this order to the district court pursuant to Fed.R.App.P. 5. Scalia and Buckley (who did not participate in this order), CJs, and McGowan, SCJ.
(E) 04-09-86	Certified copy of above order transmitted to the District Court.

(E) 04-08-86 Clerk's order that the Clerk of the District Court, upon payment of the docketing fee, shall certify and transmit to this Court a preliminary record in this case.

(R) 04-11-86 Notice from Clerk, DC re: Court of Appeals docketing fee was paid of April 10, 1986 [15]

(T) 04-21-86 Orders entered 4/8/86 addressed to George Tompkins, Jr. returned "Attempted Not Known" —resent to NY office on 4/21/86.

(E) 05-07-86 15-APPELLANTS' BRIEF (p-7) [BIN NO. 17-5]

(E) 05-07-86 7-JOINT APPENDIX VOLS. I-III (p-7)

(R) 06-09-86 15-APPELLEE'S BRIEF

(R) 06-26-86 4-Appellant's motion for leave to file reply brief after filing deadline (m-26) [13]

(E) 07-11-86 Clerk's order granting appellant's motion to extend briefing time, and the briefing schedule is revised as follows: Appellant's reply brief—July 11, 1986. (The Clerk is directed to file appellant's lodged reply brief.)

(E) 07-11-86 15-APPELLANT'S REPLY BRIEF (m-26)

(J) 01-07-87 CERTIFIED ORIGINAL RECORD—13 volumes; 7 transcripts under 2 separate covers; and 4 exhibits in brown folders

(J) 01-08-87 Clerk's order, *sua sponte*, that the following times are allotted for oral argument: Appellant—20 minutes; Appellee—20 minutes. The panel considering this case will now consist of Circuit Judges Ruth B. Ginsburg, Williams and D.H. Ginsburg

(J) 01-20-87 ARGUED before Ruth B. Ginsburg, Williams and D.H. Ginsburg, CJs (BIN 47-3)

(X) 01-21-87 4-Letter from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-21) (25)

(W) 01-26-87 4-Letter from counsel for appellee advising of additional authorities pursuant to FRAP 28(j) (p-26)

(J) 01-30-87 Per Curiam order that because we are unable to determine the precise scope of the district court's order denying plaintiffs' motion, we hereby remand the record in this case for clarification (see order for details). Ruth B. Ginsburg, Williams and D.H. Ginsburg, CJs.

(J) 02-03-87 Copy of above order and original record sent to Clerk, District Court

(X) 04-15-87 4-Letter from counsel for appellee advising of additional authorities pursuant to FRAP 28(j) (p-14) (25)

(C) 06-09-87 SUPPLEMENTAL CERTIFIED ORIGINAL ON REMAND (2 pleadings)

(C) 06-17-87 Per curiam order that in view of the briefs filed by the parties before the district court upon remand of the record, the court sees no need for further briefing. However, the court grants the request of the Plaintiffs' Steering Committee to this extent. No later than June 24, 1987, either party, or both parties, may file an additional brief or memorandum. If both parties filed, the filing should be simultaneous. If such an additional brief or memorandum is filed, it should not exceed ten pages, and should not duplicate argument presented to the district court in the briefs identified above. The parties are additionally admonished not to reargue the issue addressed in the briefs previously submitted in this appeal. Should either or both parties decide not to file a further brief or memorandum, counsel should so notify the court forthwith. Ruth B. Ginsburg, Williams and D.H. Ginsburg, CJ's

(X) 06-19-87 4-Letter from counsel for appellee advising that they will not submit additional brief (m-19) (25)

(X) 06-23-87	4-Letter from counsel for appellant advising it will not submit a further brief (p-23) (25)
(R) 06-29-87	Order mailed to George N. Thompkins, Jr. by first class mail dated June 17, 1987 returned "addressee unknown" [13]
(D) 09-25-87	Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg.
(D) 09-25-87	Concurring opinion filed by Circuit Judge D.H. Ginsburg, in which Circuit Judge Williams joins.
(D) 09-25-87	Judgment by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.
(D) 09-25-87	Mandate order.
(R) 10-06-87	5-Appellee's bill of cost (Korean Air Lines Co.) (m-2) [9]
(R) 10-23-87	23-Appellant's motion for rehearing en banc (m-22) [1]
(J) 11-16-87	Per Curiam order en banc that the petition of plaintiffs' Steering Committee for rehearing en banc is denied. CJ Wald, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, CJs.
(D) 11-27-87	MANDATE ISSUED. Costs are awarded to Korean Air Lines Co., Ltd. in the amount of $1,041.24 and taxed against plaintiff's Steering Committee.
(R) 11-30-87	Order mailed to Desmond T. Barry, Jr. by first class mail dated 11-16-87 returned "moved not forwardable—adressee unknown" [13]
(J) 12-15-87	Above order was remail to Barry, Jr. to his New York office on 12-15-87
(R) 01-12-88	Notice from Clerk, Supreme Court advising that petition for certiorari was filed in SC #87- 1055 on 12-23-87 [1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST KOREAN AIR LINES

Plaintiffs in the above cited cases, by Plaintiffs' Steering Committee, hereby move this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 1-9(h), for partial summary judgment in two separate branches: first, that Korean Air Lines is liable without fault for compensatory damages without any limitation of $75,000 and second, that Korean Air Lines shall promptly pay $75,000 to the plaintiff for the benefit of the family of each pasenger in the above actions. In support of their Motion, plaintiffs rely on the Statement of Material Facts, the Exhibits identified by an Attorney's Affidavit and the accompanying Memorandum of Law.

Dated: February 15, 1984

Respectfully submitted,

Plaintiffs' Steering Committee
Donald W. Madole, and Milton G. Sincoff,
Co-Chairmen, and
George E. Farrell and F. Lee Bailey

By: /s/ DONALD W. MADOLE
Donald W. Madole, Co-Chairman

By: /s/ MILTON G. SINCOFF
Milton G. Sincoff, Co-Chairman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

PLAINTIFFS' STATEMENT OF MATERIAL FACTS PURSUANT TO RULE 1-9 (h)

Plaintiffs' Steering Committee, pursuant to the Court's Rule 1-9(h), and in support of the motion for partial summary judgment against Korean Air Lines, respectfully submits the following statement of material facts as to which the PSC contends there is no genuine issue.

In the event that Korean Air Lines denies any of the following facts as to a particular action, but not as to all actions, then Korean Air Lines is requested to identify each such action.

1. All actions identified on Appendices A and B name decedents who were passengers on Korean Air Lines flight 007 on September 1, 1983.

2. During that flight, all of said passengers died.

3. Each of said passengers was aboard the plane pursuant to a ticket listing places which constituted "international transportation" as defined by Article 1 of the Warsaw Convention.

4. In 1969, Korean Air Lines signed Exhibit 1, commonly known as the Montreal Agreement.

5. Exhibit 1 was in effect on September 1, 1983.

6. Exhibit 2 is the Foreign Air Carrier permit issued by the United States to Korean Air Lines.

7. Exhibit 2 was in effect on September 1, 1983.

8. Each passenger identified in actions on Appendix A had a ticket coupon of which the auditor's coupon in Exhibit 3 is a copy.

9. Each passenger identified in actions on Appendix A received ticket booklet "2", "3" or "4" in Exhibit 4.

10. Each ticket booklet "2", "3" and "4" in Exhibit 4 contained the "Advice to International Passengers on Limitation of Liability" printed in 8-point type size print or less.

11. Compensatory damages caused by the death of each passenger identified in actions on Appendix B is $75,000 or more.

Dated: February 15, 1984

PLAINTIFFS' STEERING COMMITTEE
Donald W. Madole and Milton G. Sincoff,
Co-Chairmen, and
George E. Farrell and F. Lee Bailey

By: /s/ DONALD W. MADOLE
Donald W. Madole, Co-Chairman

By: /s/ MILTON G. SINCOFF
Milton G. Sincoff, Co-Chairman

Appendix A

In numerical order, the cases identified below seek partial summary judgment that Korean Air Lines is liable without fault for full compensatory damages without the $75,000 limitation.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-2794	Ho	Yuk Yee Ho	Speiser	D.C.
83-3007	Chee	Ho Ming Tai	Speiser	D.C.
83-3448	Lim	Jong Jin Lim	Bailey	S.D.N.Y.
83-3450	WuDunn	Sirena WuDunn	Kreindler	S.D.N.Y.
83-3454	Yoo	Chung Soo Yoo	Kreindler	S.D.N.Y.
83-3457	Ting	Shin Jen Ma	Bailey	S.D.N.Y.
83-3458	Swift	Frances Swift	Bailey	S.D.N.Y.
83-3459	Park	Hane Tae Park	Bailey	S.D.N.Y.
83-3463	Ephaimson-Abt	Alice Ephaimson-Abt	Baker	S.D.N.Y.
83-3465	Chan	Amado Chan	Kreindler	E.D.N.Y.
83-3466	Chan	Joseph Chan	Kreindler	E.D.N.Y.
83-3469	Chambers	Joyce Chambers	Charfoos	E.D. Mich.
83-3470	Jones	Margret Zarif	Thurswell	E.D. Mich.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-3473	Simmons	Lucille Dawson	Aven	E.D. Mich.
83-3678	Chi	Michael Kai Fai	Speiser	D.C.
83-3792	Maikovich	Allen Kohn	Speiser	D.C.
83-3792	Maikovich	Lillian Kohn	Speiser	D.C.
83-3890	Lin	San Mei Lin	Speiser	D.C.
83-3898	Nassief	Anthony Nassief	McHugh	S.D.N.Y.
83-3902	Zickerman	Muriel Kole	Needham	D. Mass.
83-3903	James	Hazel James	Chambers	E.D. Mich.
84-0029	Cruz	Alfredo Cruz	Kreindler	S.D.N.Y.
84-0133	Wai	Marilou Covey	Speiser	D.C.

Appendix B

In numerical order, the cases identified below seek partial summary judgment directing Korean Air Lines to promptly pay $75,000 to the family of each passenger.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-2793	Dooley	Cecilio Chuapoco	Speiser	D.C.
83-2794	Ho	Yuk Yee Ho	Speiser	D.C.
83-2941	Ocampo	Suellen Ocampo	Speiser	D.C.
83-2941	Ocampo	Corazon Ocampo	Speiser	D.C.
83-2941	Ocampo	Cecelia Ocampo	Speiser	D.C.
83-3007	Chee	Ho Ming Tai	Speiser	D.C.
83-3154	Lombard	Donald Lombard	Speiser	D.C.
83-3177	Powrie	Ian Powrie	Speiser	D.C.
83-3204	Lombard	Aiden Lombard	Speiser	D.C.
83-3448	Lim	Jong Jin Lim	Bailey	S.D.N.Y.
83-3449	Oren	William Oren	Kreindler	S.D.N.Y.
83-3450	WuDunn	Sirena WuDunn	Kreindler	S.D.N.Y.
83-3451	Bevins	Richard Bevins	Kreindler	S.D.N.Y.
83-3452	Bolante	Maria Bolante	Kreindler	S.D.N.Y.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-3453	Caltabellatta	Mary Chuapoco	Kreindler	S.D.N.Y.
83-3454	Yoo	Chung Soo Yoo	Kreindler	S.D.N.Y.
83-3455	Bolante	Eusebio Bolante	Kreindler	S.D.N.Y.
83-3456	Hong	Hyong Hong	Kreindler	S.D.N.Y.
83-3457	Ting	Shin Jen Ma	Bailey	S.D.N.Y.
83-3458	Swift	Frances Swift	Bailey	S.D.N.Y.
83-3459	Park	Hane Tae Park	Bailey	S.D.N.Y.
83-3460	Lee	Eun Hyung Lee	Bailey	S.D.N.Y.
83-3461	Lim	Jong Lim	Bailey	S.D.N.Y.
83-3462	Oh	Anna Song	Bailey	S.D.N.Y.
83-3463	Ephaimson-Abt	Alice Ephaimson-Abt	Baker	S.D.N.Y.
83-3464	Yun	Ei Sik Yun	Kreindler	E.D.N.Y.
83-3465	Chan	Amado Chan	Kreindler	E.D.N.Y.
83-3466	Chan	Joseph Chan	Kreindler	E.D.N.Y.
83-3467	Beirn	James Biern	Baker	E.D.N.Y.
83-3468	Speir	Kathy Speir	Baker	E.D.N.Y.
83-3469	Jones	Joyce Chambers	Charfoos	E.D. Mich.
83-3470	Jones	Margret Zarif	Thurswell	E.D. Mich.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-3473	Simmons	Lucille Dawson	Aven	E.D. Mich.
83-3474	Bayona	Anita Bayona	Lombardi	D.N.J.
83-3474	Bayona	Lilia Bayona	Lombardi	D.N.J.
83-3587	Forman	Evelyn Forman	Speiser	D.C.
83-3588	Putong	Jovita Putong	Speiser	D.C.
83-3678	Chi	Michael Kai Fai	Speiser	D.C.
83-3792	Maikovich	Allen Kohn	Speiser	D.C.
83-3792	Maikovich	Lillian Kohn	Speiser	D.C.
83-3793	Zareh	Darioush Zareh	Speiser	D.C.
83-3889	Oldham	John Oldham	Speiser	D.C.
83-3890	Lin	San Mei Lin	Speiser	D.C.
83-3891	Martoche	Min Sik Park	Speiser	D.C.
83-3891	Martoche	Ahe Kyung Park	Speiser	D.C.
83-3898	Nassief	Anthony Nassief	McHugh	S.D.N.Y.
83-3902	Zickerman	Muriel Kole	Needham	D. Mass.
83-3903	James	Hazel James	Chambers	E.D. Mich.
84-0029	Cruz	Alfredo Cruz	Kreindler	S.D.N.Y.
84-0030	Caltabellatta	Celita Chuapoco	Kreindler	S.D.N.Y.
84-0133	Wai	Marilou Covey	Speiser	D.C.
84-0402	Baek	Yun J. Baek	Bailey	S.D.N.Y.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
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IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST KOREAN AIR LINES

State of New York)
) SS.:
County of New York)

Milton G. Sincoff, being duly sworn, deposes and says:

I am Co-Chairman of Plaintiffs' Steering Committee which has been authorized by the plaintiffs' attorneys in the actions identified above to bring this motion.

This affidavit is respectfully submitted in support of said plaintiffs' motion for partial summary judgment against Korean Air Lines.

Attached as Exhibit 1 is the Montreal Agreement executed by Korean Air Lines in 1969 and in effect on September 1, 1983.

Exhibit 2 is the Foreign Air Carrier Permit issued by the United States to Korean Air Lines and in effect on September 1, 1983.

Exhibit 3 contains ticket documentation produced by Korean Air Lines for each passenger identified on Appendix A.

Exhibit 4 contains ticket booklets "2", "3" and "4" produced by Korean Air Lines. Each of the passengers identified on Appendix A received ticket booklet "2", "3" or "4".

Exhibit 5 contains the transcript of the document production session of Korean Air Lines on January 13, 1984. At that session, the attorney for Korean Air Lines stated that to the best of its information and belief at that time the passengers whose names appear on the tickets produced were in fact passengers aboard the flight (pages 8-9).

Exhibit 6 contains the affidavits of two qualified printers, Gilbert Richman and Michael Minnicino.

Exhibit 7 contains the affidavits submitted on behalf of plaintiffs who seek immediate payment of $75,000 from Korean Air Lines.

WHEREFORE, plaintiffs' motion should be granted.

/s/ MILTON G. SINCOFF
Milton G. Sincoff

Sworn to before me this
15th day of February, 1984.

/s/ CYNTHIA AVINO
Notary Public

CYNTHIA AVINO
Notary Public, State of New York
No. 41-4779354
Qualified in Queens County
Commission Expires March 30, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

EXHIBITS

ACCOMPANYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST KOREAN AIRLINES

Dated: February 17, 1984

Plaintiffs' Steering Committee
Donald W. Madole, and Milton G. Sincoff,
Co-Chairmen, and
George E. Farrell and F. Lee Bailey

EXHIBIT 1

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America, as a point of origin, point of destination, or agreed stopping place.
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket, or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other* carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

* Either alternative may be used.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as requested. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

/s/ CHOONG HOON CHO
Choong Hoon Cho
President
Korean Air Lines, Inc.

EXHIBIT 2

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Issued pursuant to Order 71-4-161

PERMIT TO FOREIGN AIR CARRIER
(as reissued and amended)

KOREAN AIR LINES CO., LTD.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

> Between a point or points in the Republic of Korea; intermediate points in Japan; and the coterminal points Honolulu, Hawaii, and Los Angeles, California.

The holder shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

This permit shall be subject to the following terms, conditions, and limitations:

(1) Except with respect to flights carrying only cargo and/or mail, all flights which serve Los Angeles, California, shall also serve Honolulu, Hawaii.

(2) The holder shall not ship any cargo handled by Korea Air Terminal Service Co., Ltd. (Republic of Korea) in that company's capacity as an indirect foreign air carrier or IATA cargo

agent; nor shall the holder allow any direct air carrier or international air freight forwarder (including an indirect foreign air carrier) acting as its agent to ship any cargo handled by Korea Air Terminal Service Co., Ltd. (Republic of Korea).

The holder shall not provide foreign air transportation under this permit unless it holds a currently effective authorization from the Government of the Republic of Korea for such operations.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the Republic of Korea for Korean international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the Republic of Korea shall be parties.

The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize

the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

By accepting this permit the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

The exercise of the privileges granted hereby shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be *effective on April 23, 1971*. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the route hereby authorized from the route which may be operated by airlines designated by the Government of the Republic of Korea, or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of the Republic of Korea in lieu of the holder hereof, or (3) upon the termination or expiration of the Air Transport Agreement between the Government of the United States and the Government of the Republic of Korea, dated April 24, 1957, and amended by an exchange of notes effective March 26, 1971: *Provided, however*, That if prior to the occurrence of the event specified in clause (3) of this paragraph, the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and the Republic of Korea are or shall become parties, then and in that event this permit is continued in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 5th day of April, 1971.

/s/ _____
Phyllis T. Kaylor
Acting Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on April 23, 1971,
in Order 71-4-161.

EXHIBIT 3

MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-2794
D.D.C.

ROBERT HO, Individually and as Personal Representative of the Estate of YUK HE HO, deceased, on behalf of himself, of Lam Ho of Kwan Ho, of Pak On Ho and of Pak Chuen Ho. 3041 Curger Avenue Bronx, New York 10467

Plaintiff,

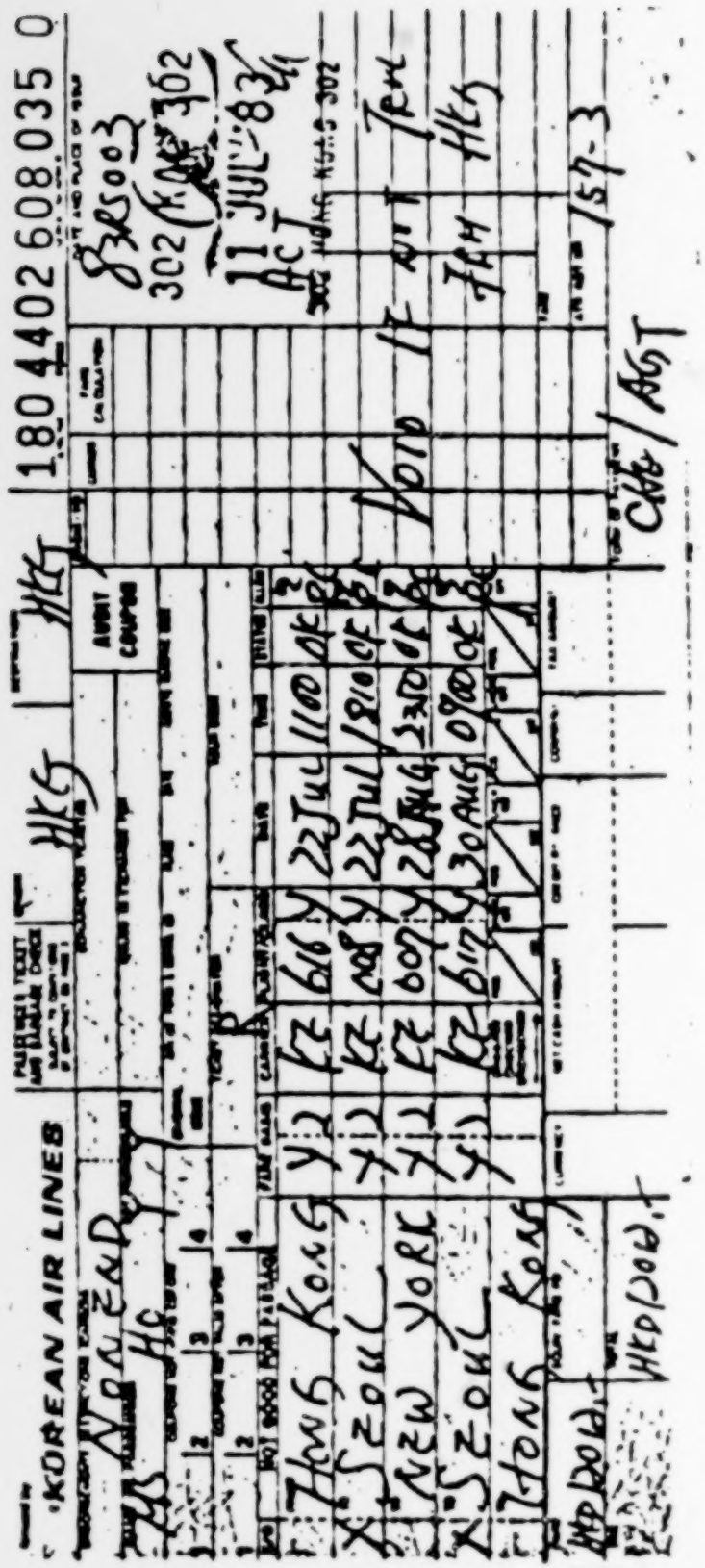
v.

KOREAN AIR LINES, INC. and
THE UNITED STATES OF AMERICA,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3007
D.D.C.

HO YAN CHEE, Individually and as Personal Representative of the Estate of HO MING TAI, deceased, Room 607, West Terrace Sai Wan Estate Kennedy Town, Hong Kon

Plaintiff,

v.

KOREAN AIR LINES, INC. and
THE UNITED STATES OF AMERICA,

Defendants.

Sample Ticket Booklet No.: 3

[See Opposite —]

MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3448
D.D.C.

BETTY B.S. LIM, as Administratix Ad Prosequendum of the Estate of DR. JONG JIN LIM, deceased,

Plaintiff,

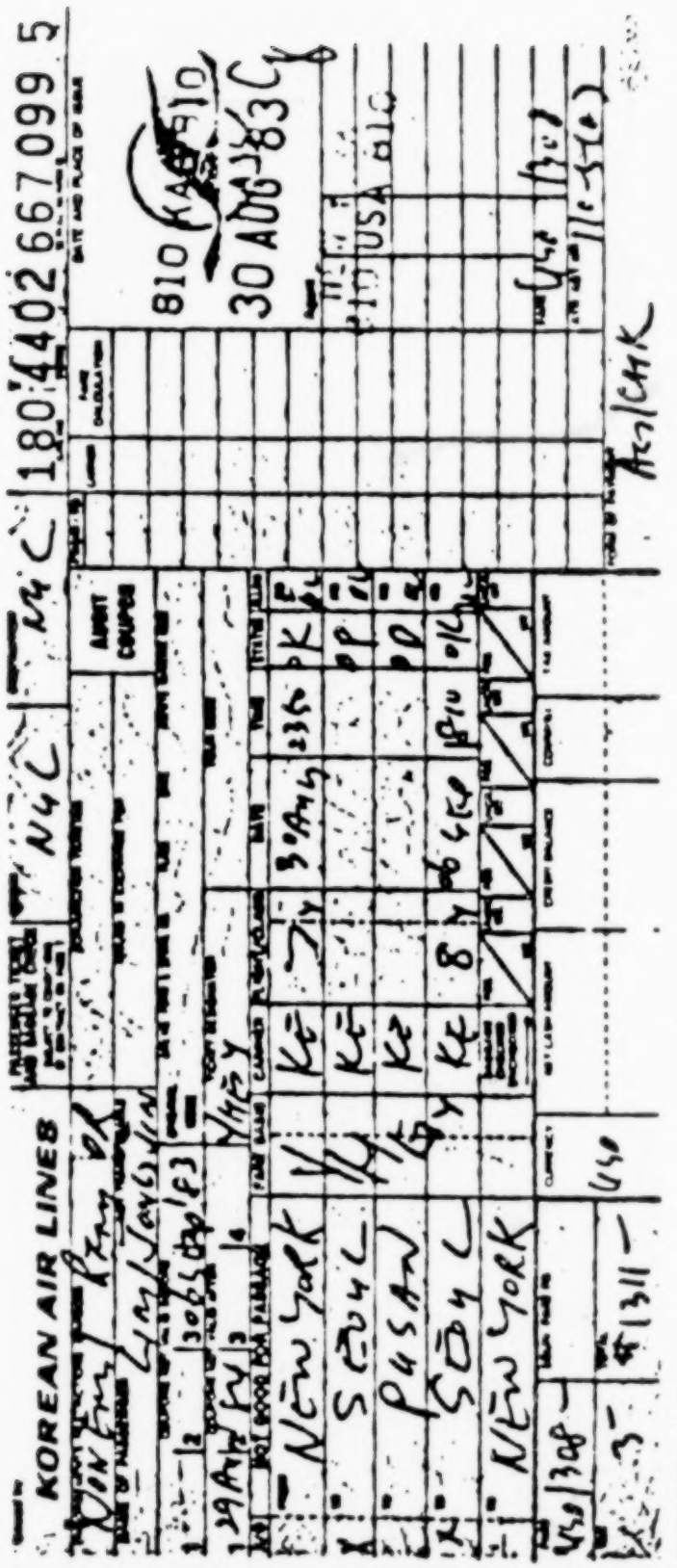
—against—

KOREAN AIR LINES, INC., THE BOEING COMPANY, LITTON INDUSTRIES, INC., and THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3450
D.D.C.

DAVID WU DUNN, as Personal Representative and Administrator of the Estate of SIRENA WU DUNN, deceased,

Plaintiff,

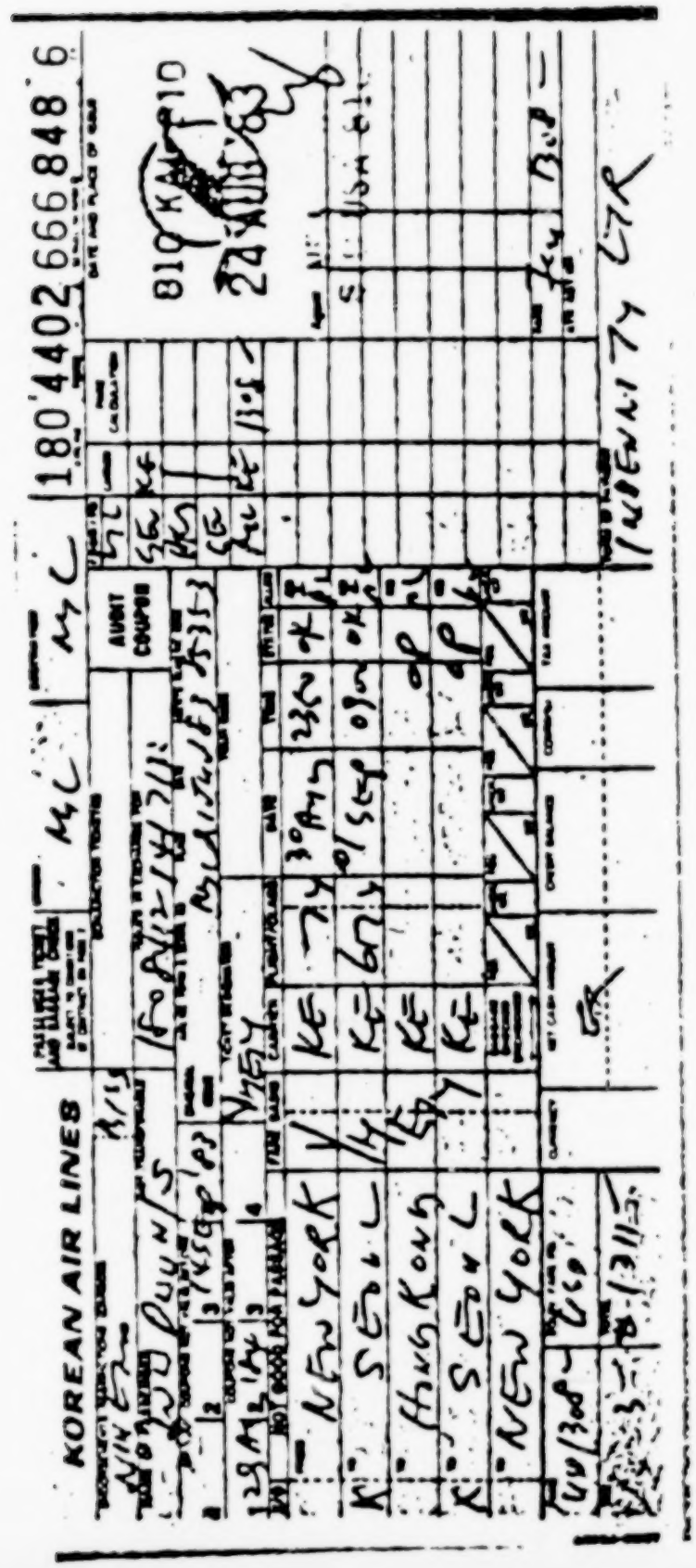
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3454
D.D.C.

SUNGWHA OH YOO, as Personal Representative and Executrix of the Estate of CHUNG SOO YOO, deceased,

Plaintiff,

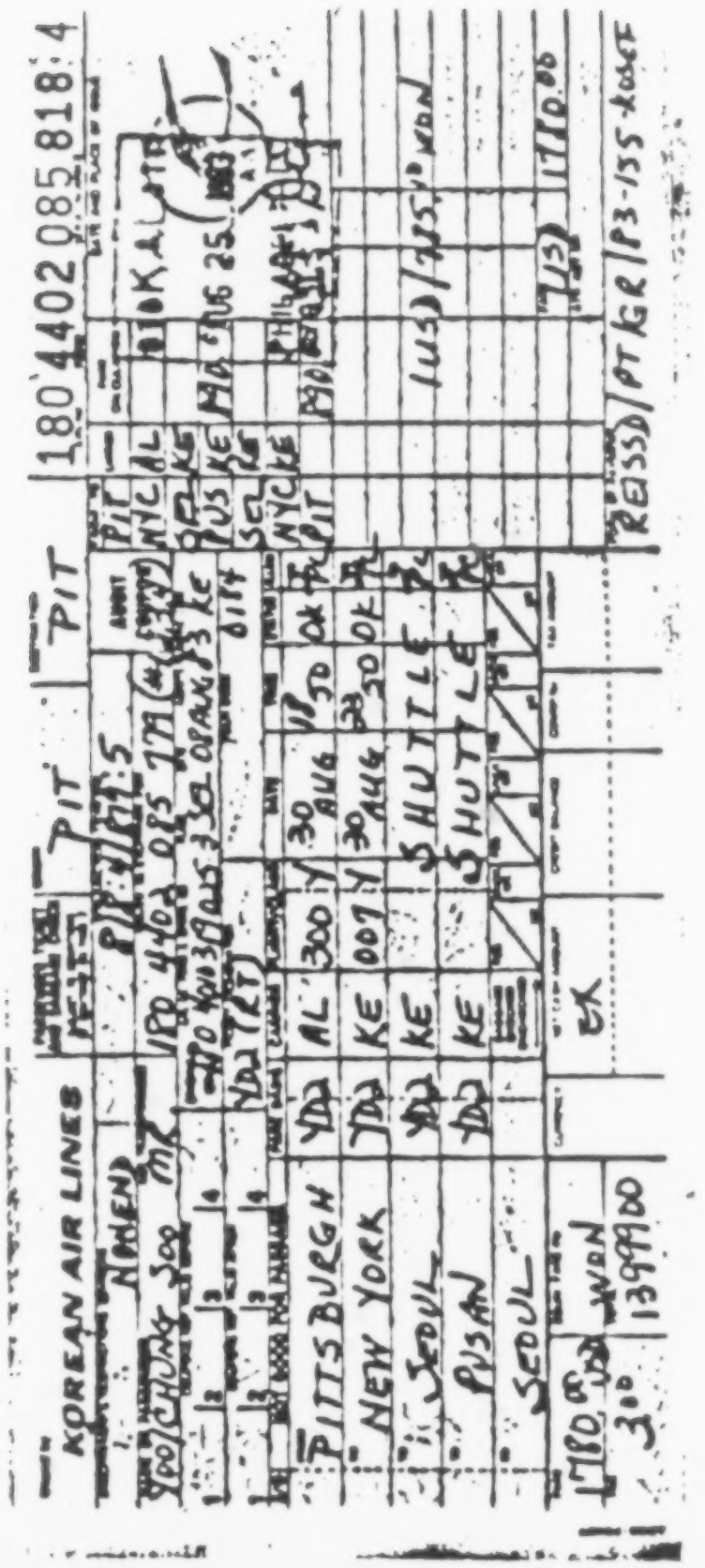
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES

Defendants.

Sample Ticket Booklet No.: 3

[See Opposite —]


KOREAN AIR LINES
PIT
SEOUL
PUSAN
NEW YORK
PITTSBURGH
SEOUL

MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3457
D.D.C.

CHRISTINA TING, as the Personal Representative of and the Intended Temporary Administratrix of the Goods, Chattels and Credits of SHIH JEN MA, Deceased,

Plaintiff,

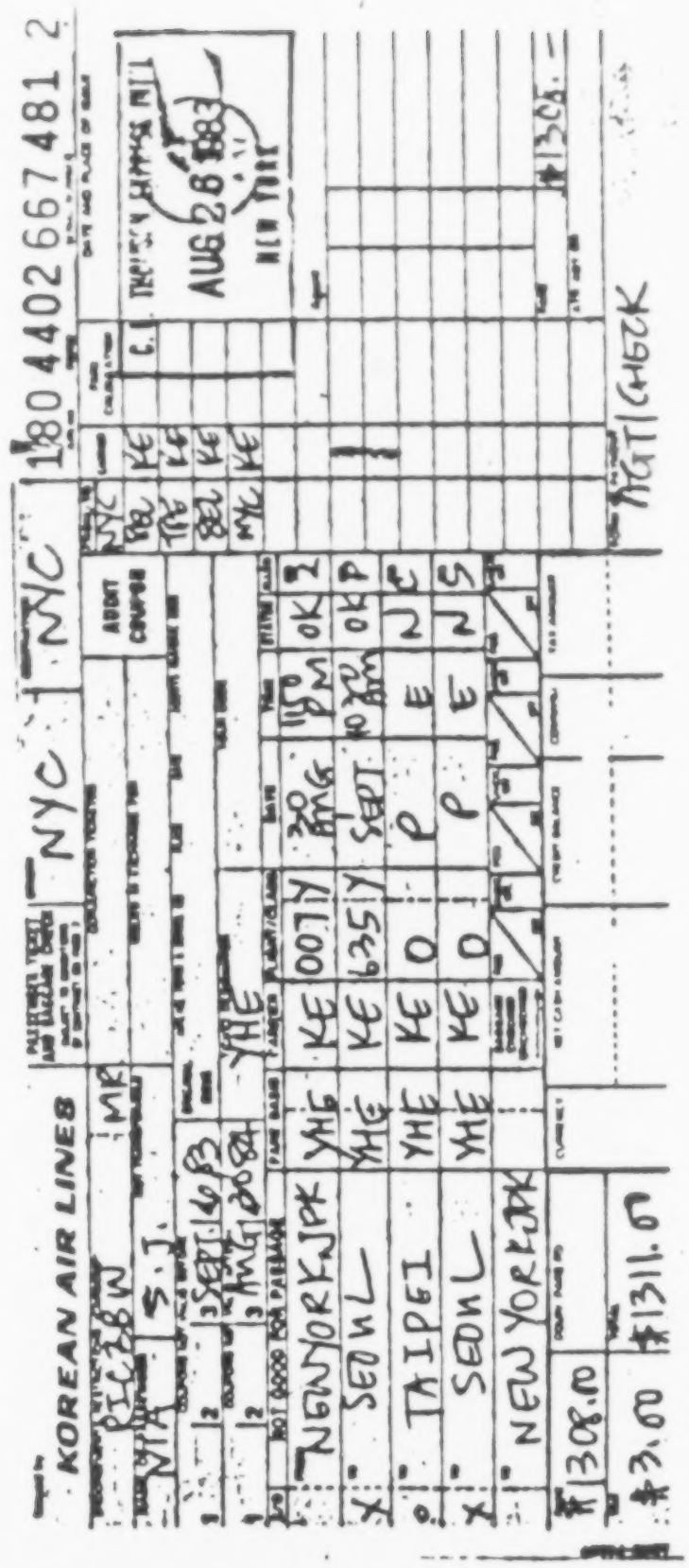
—against—

KOREAN AIR LINES, INC. THE BOEING COMPANY, LITTON INDUSTRIES, INC. and THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3458
D.D.C.

BARBARA SWIFT, as the Personal Representative of and the Administratrix of the Estate of FRANCES MAE SWIFT, Deceased,

Plaintiff,

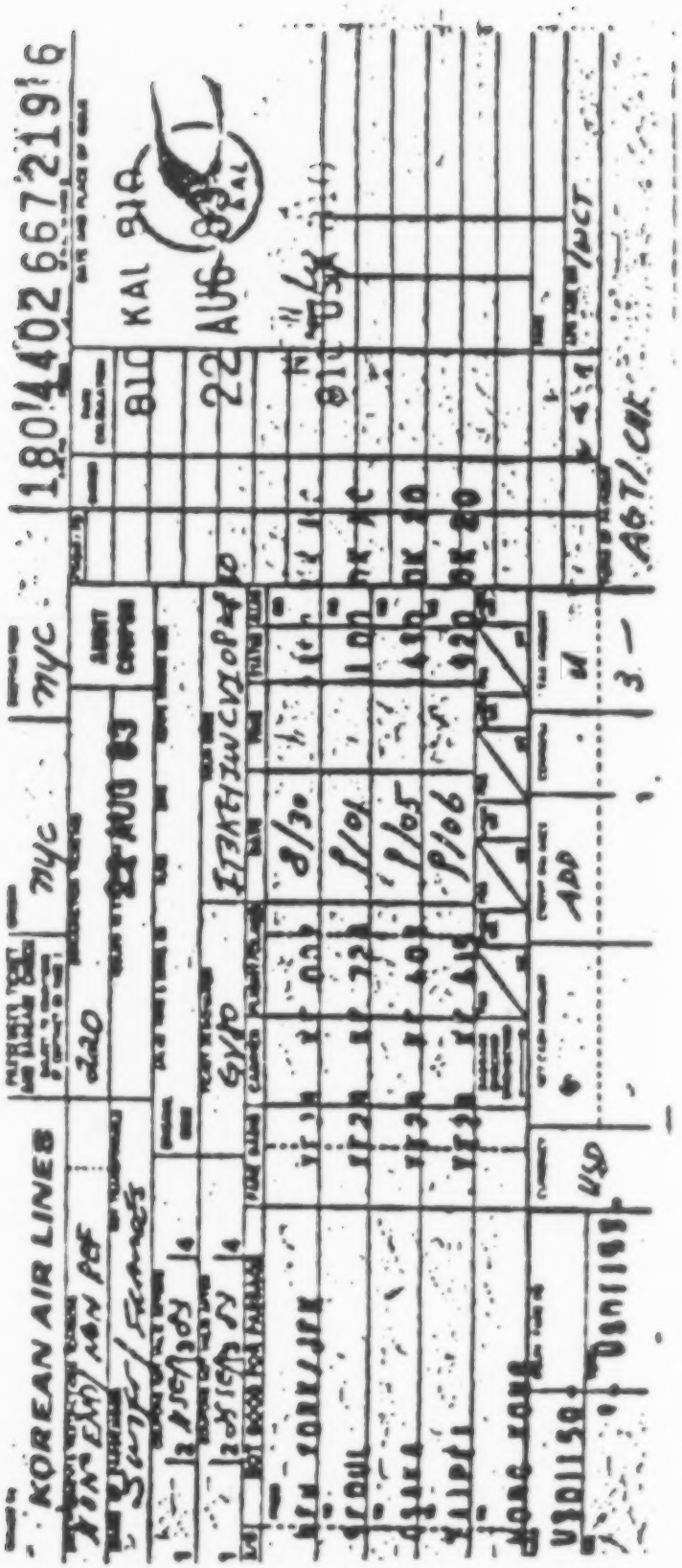
—against—

KOREAN AIR LINES, INC., THE BOEING COMPANY, LITTON INDUSTRIES, INC. and THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3459
D.D.C.

KYUNG HWA PARK, as the Personal Representative of and the Administratrix of the Estate of HAN TAE PARK, Deceased,

Plaintiff,

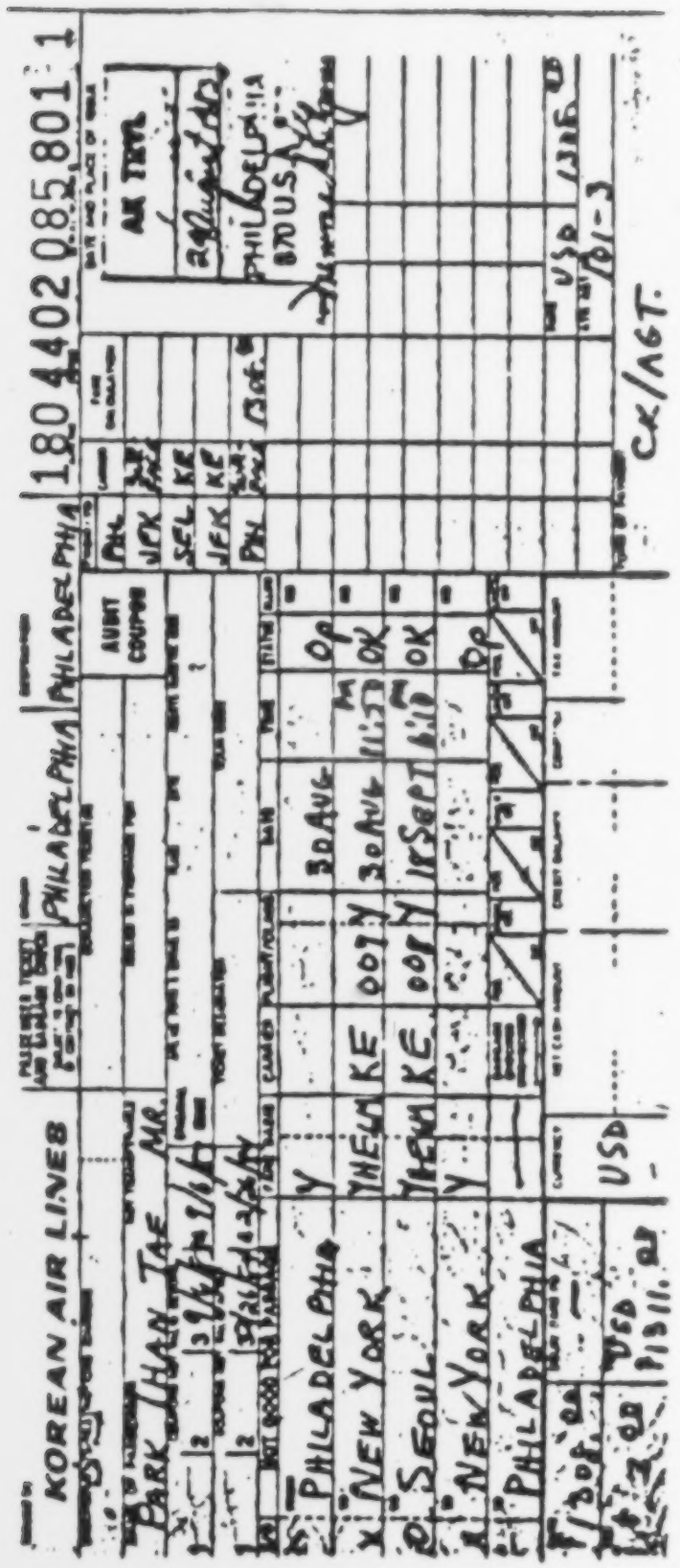
—against—

KOREAN AIR LINES, INC. THE BOEING COMPANY, LITTON INDUSTRIES, INC. and THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 3

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3463
D.D.C.

HANS EPHRAIMSON-ABT, Executor of the Estate of Alice Ephraimson-Abt, deceased,

Plaintiffs,

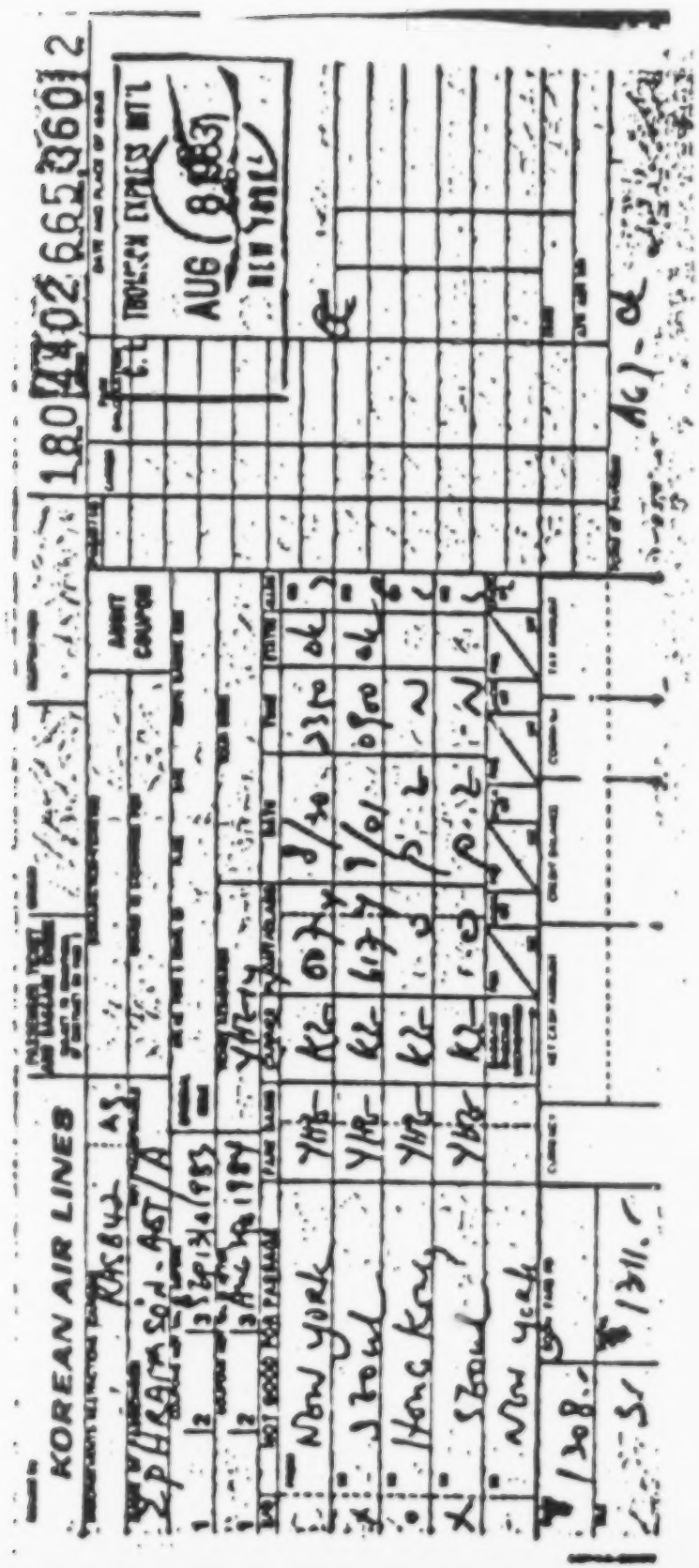
—against—

KOREAN AIR LINES INC., JOHN DOE I, EXECUTOR OF THE ESTATE OF CHUN BYUNG IN, JOHN DOE II, EXECUTOR OF THE ESTATE OF DONG HUI SOHN, JOHN DOE II, EXECUTOR OF THE ESTATE OF EUI DONG KIM; THE BOEING COMPANY; LITTON INDUSTRIES, INC.; AND THE UNION OF THE SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3465
D.D.C.

ELISA E. CHAN, as Personal Representative and Administratrix of the Estate of AMADO E. CHAN, deceased,

Plaintiff,

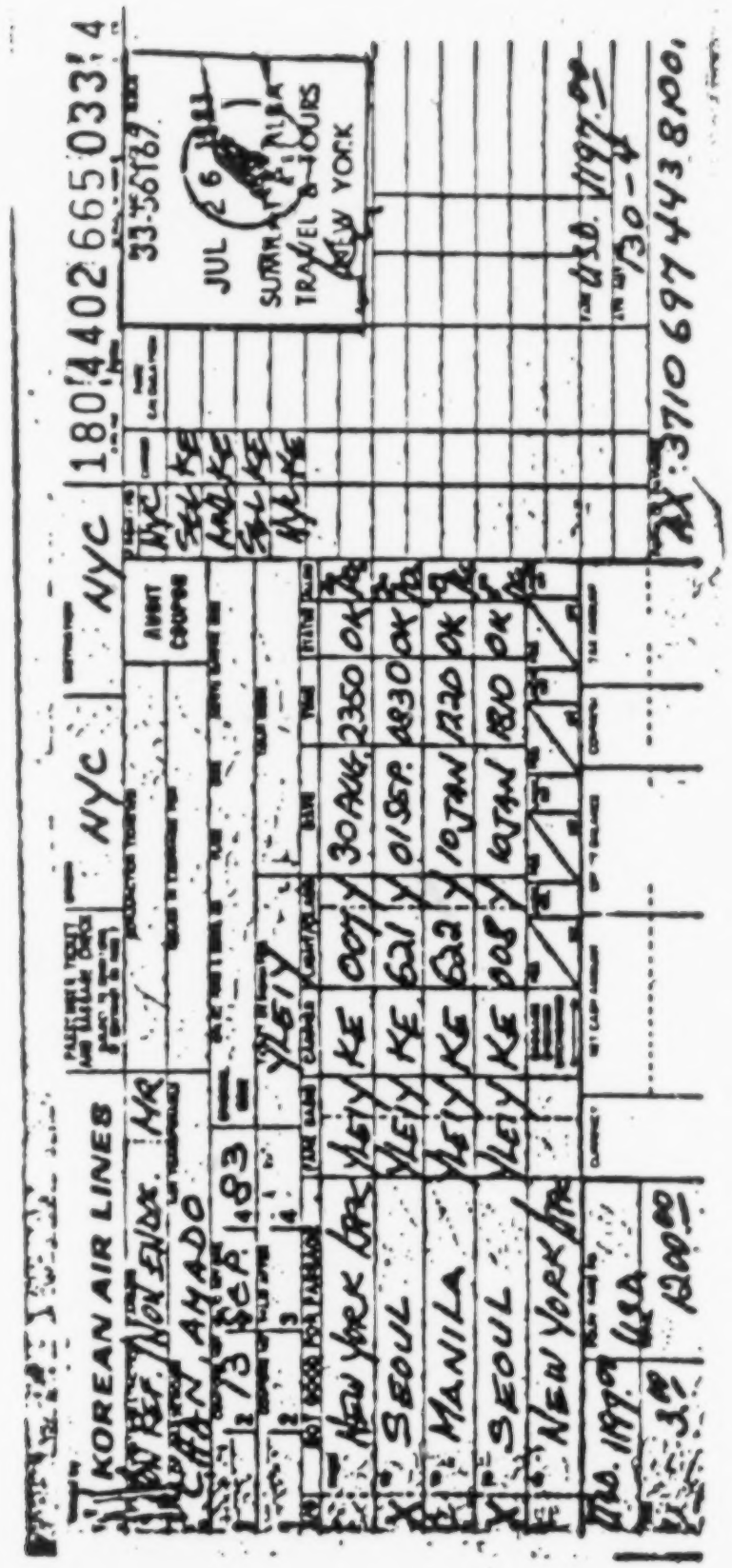
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3466
D.D.C.

ELISA E. CHAN, as Personal Representative and Administratrix of the Estate of JOSEPH E. CHAN, deceased,

Plaintiff,

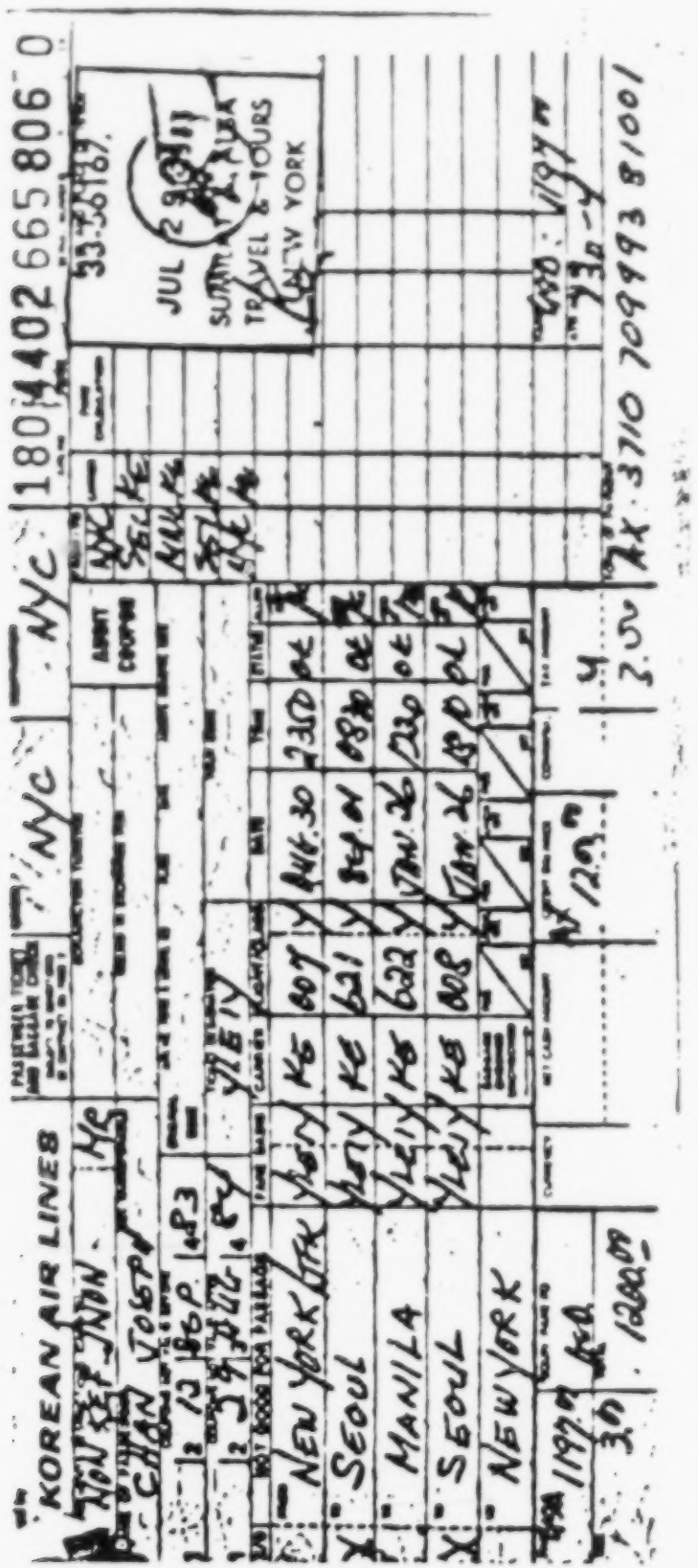
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3469
D.D.C.

JAMES L. CHAMBERS and DOROTHY JONES, Administrators of the Estate of JOYCE CHAMBERS, Deceased,

Plaintiff,

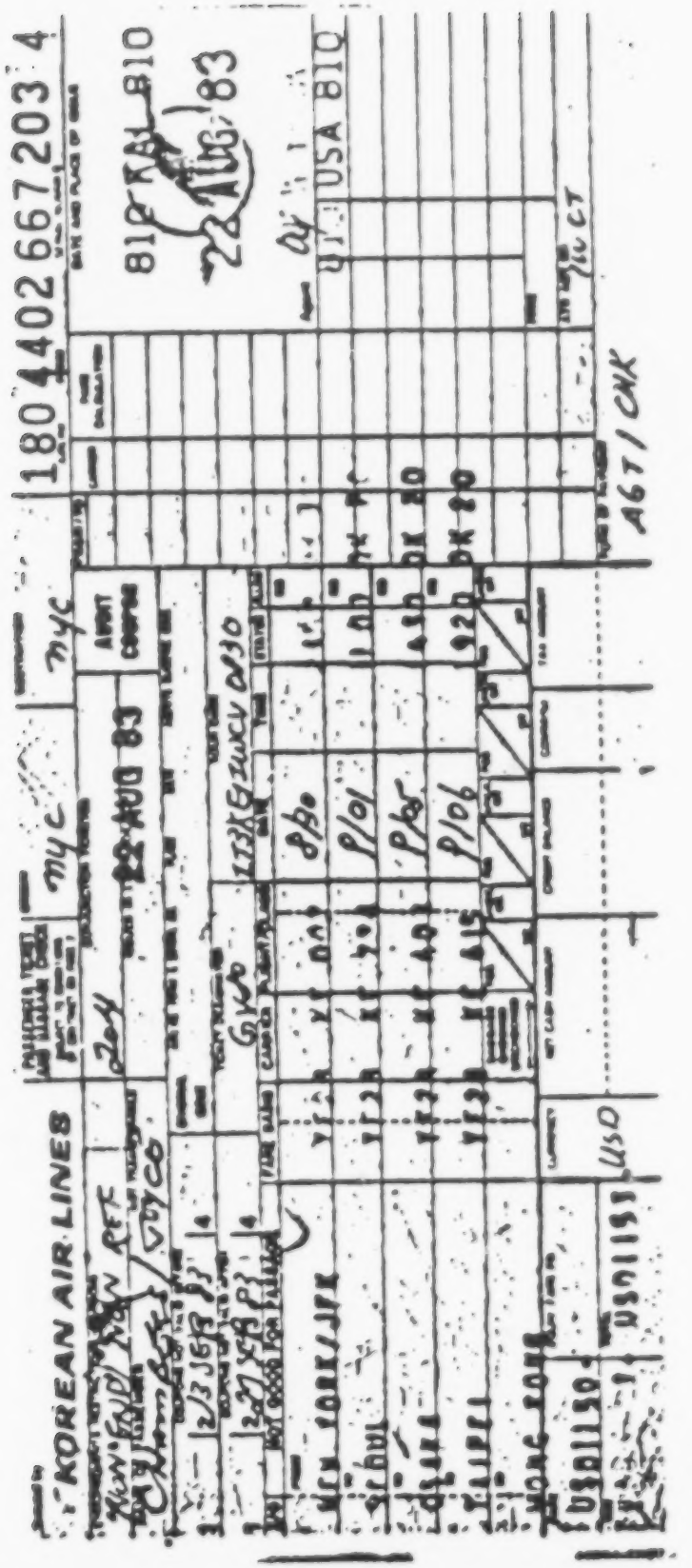
—vs—

KOREAN AIRLINES, INC. a foreign corporation,

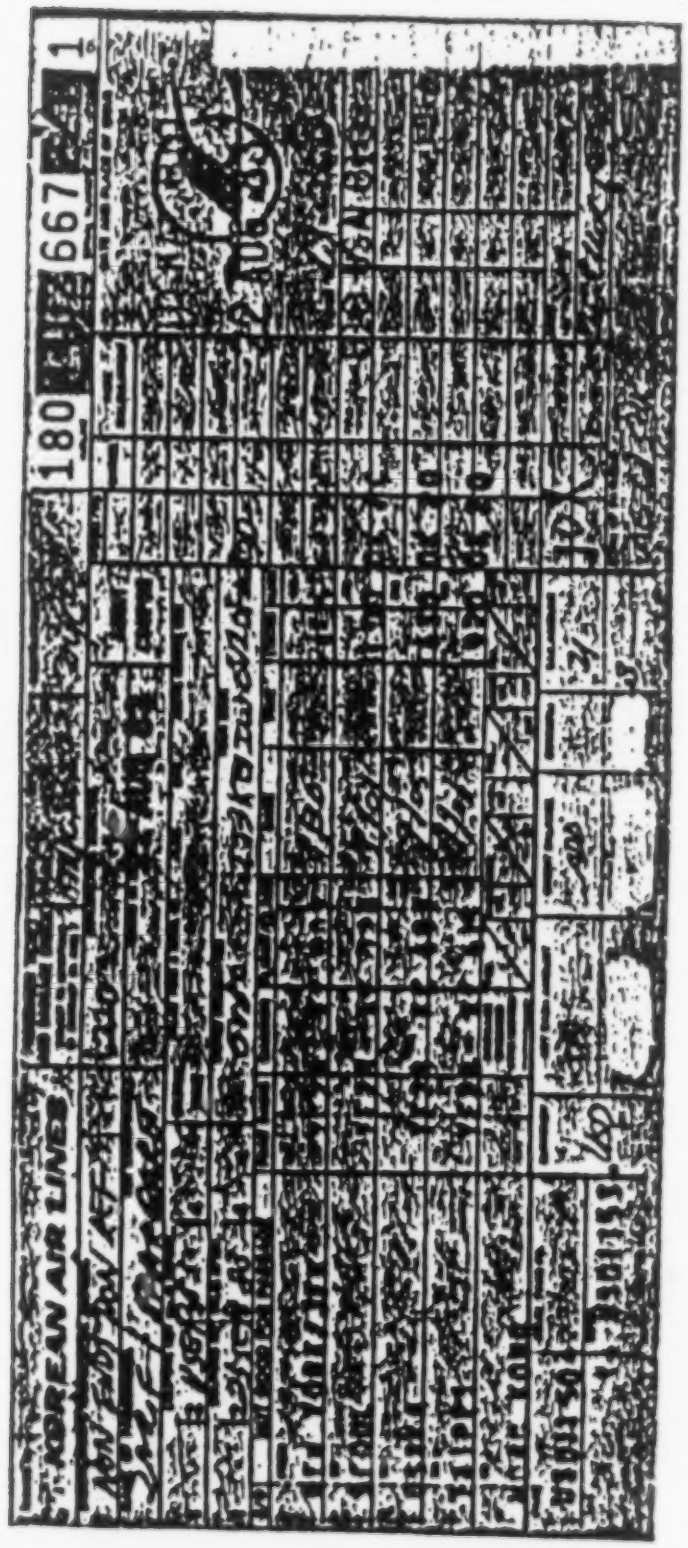
Defendant.

Sample Ticket Booklet No.: 4

[See Opposite →]



83 Civ. 3470
Booklet No. 4



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MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3473
D.D.C.

ALICE F. SIMMONS, ADMINISTRATRIX OF THE ESTATE OF LUCILLE L.V. DAWSON, DECEASED,

Plaintiff,

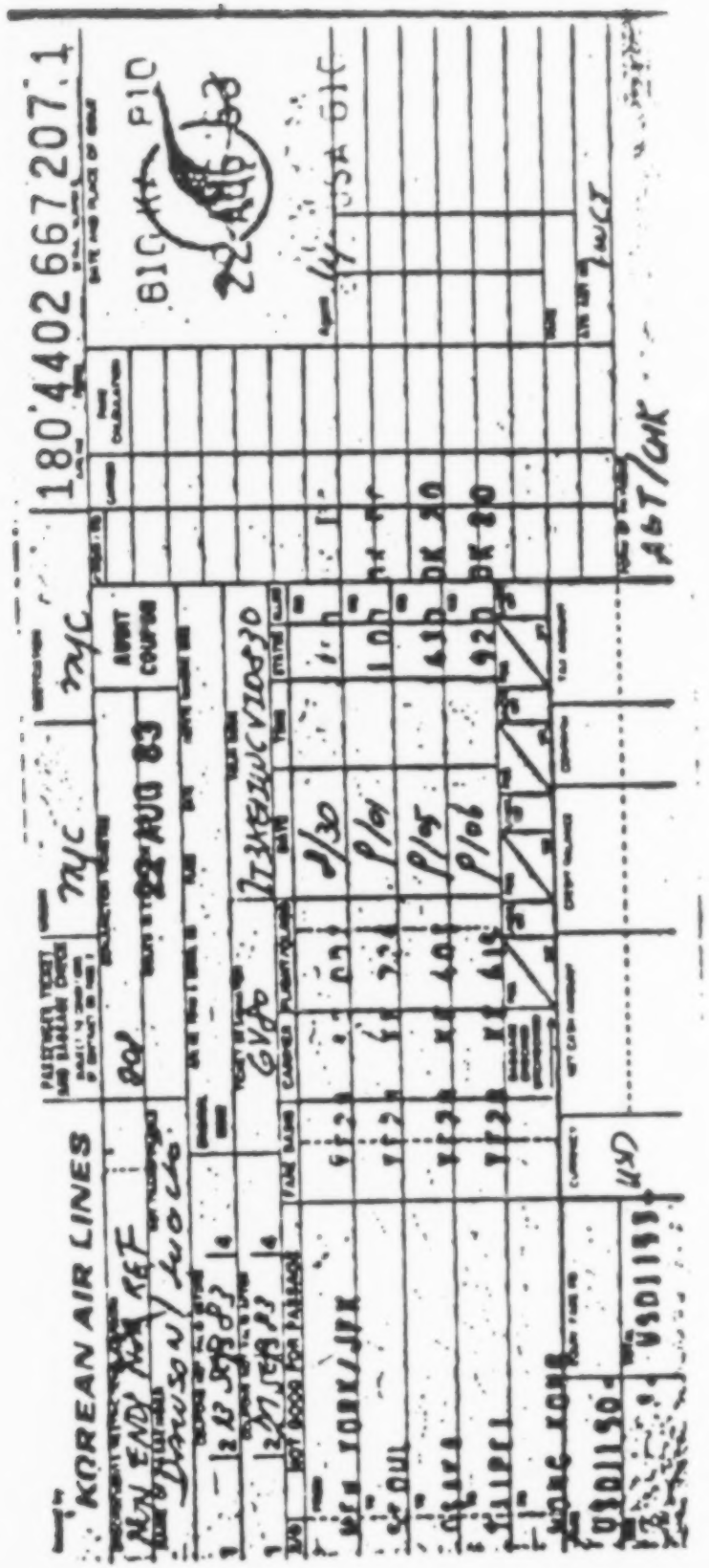
vs.

KOREAN AIRLINES
GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3678
D.D.C.

LAM LAP CHI, Individually, as Personal Representative of the Estate of MICHAEL WONG KAI FAI, Deceased, 4 Wah Lok Path, World Fair Court, Flat C, Sixth Floor Hong Kong

Plaintiff,

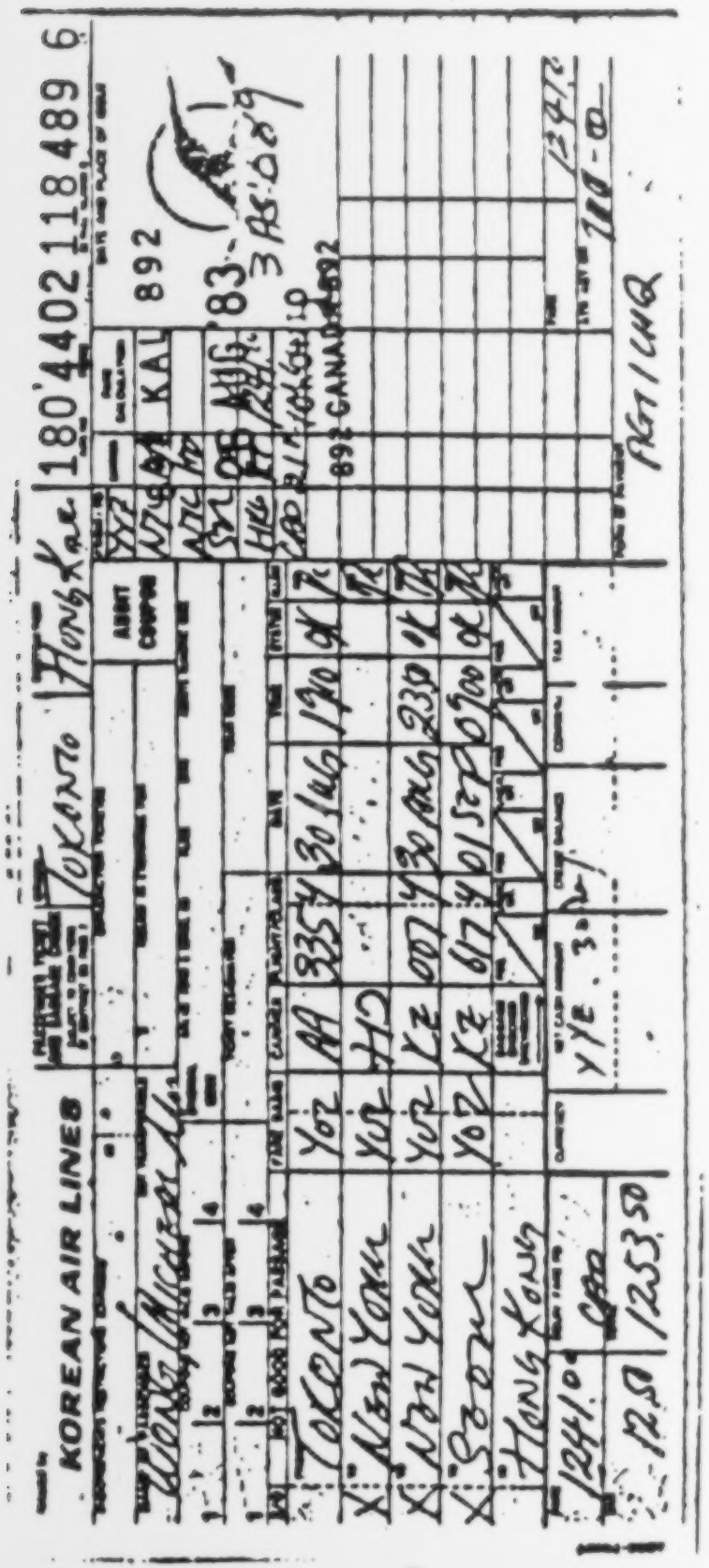
v.

KOREAN AIR LINES CO., LTD. and
THE UNITED STATES OF AMERICA,

Defendants.

Sample Ticket Booklet No.: 3

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3792
D.D.C.

MARSHA J.K. MAIKOVICH, Individually and as Administratrix of the Estate of ALLEN DAVID KOHN, deceased, and as Administratrix of the Estate of LILLIAN ROSE KOHN, Deceased 637 Harvard Road, Bala Cynwyd, PA 19004

Plaintiff

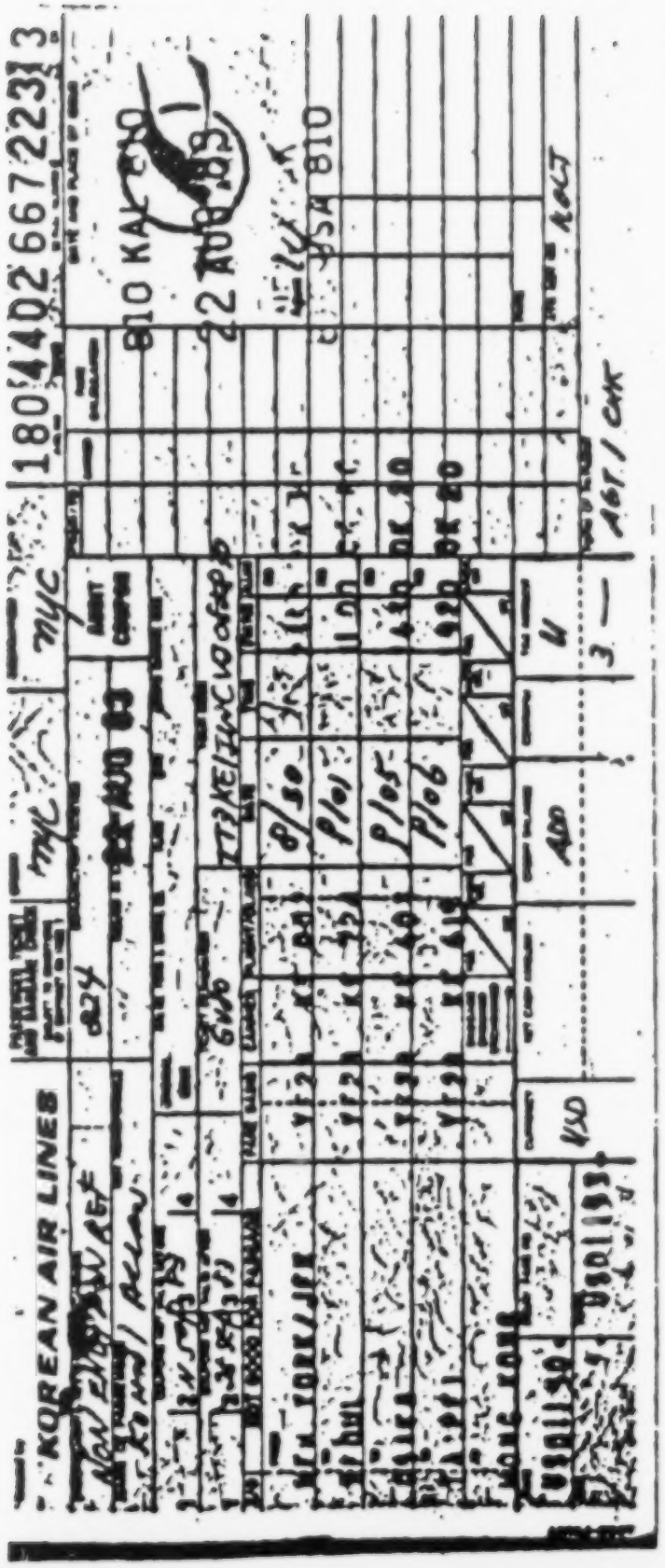
v.

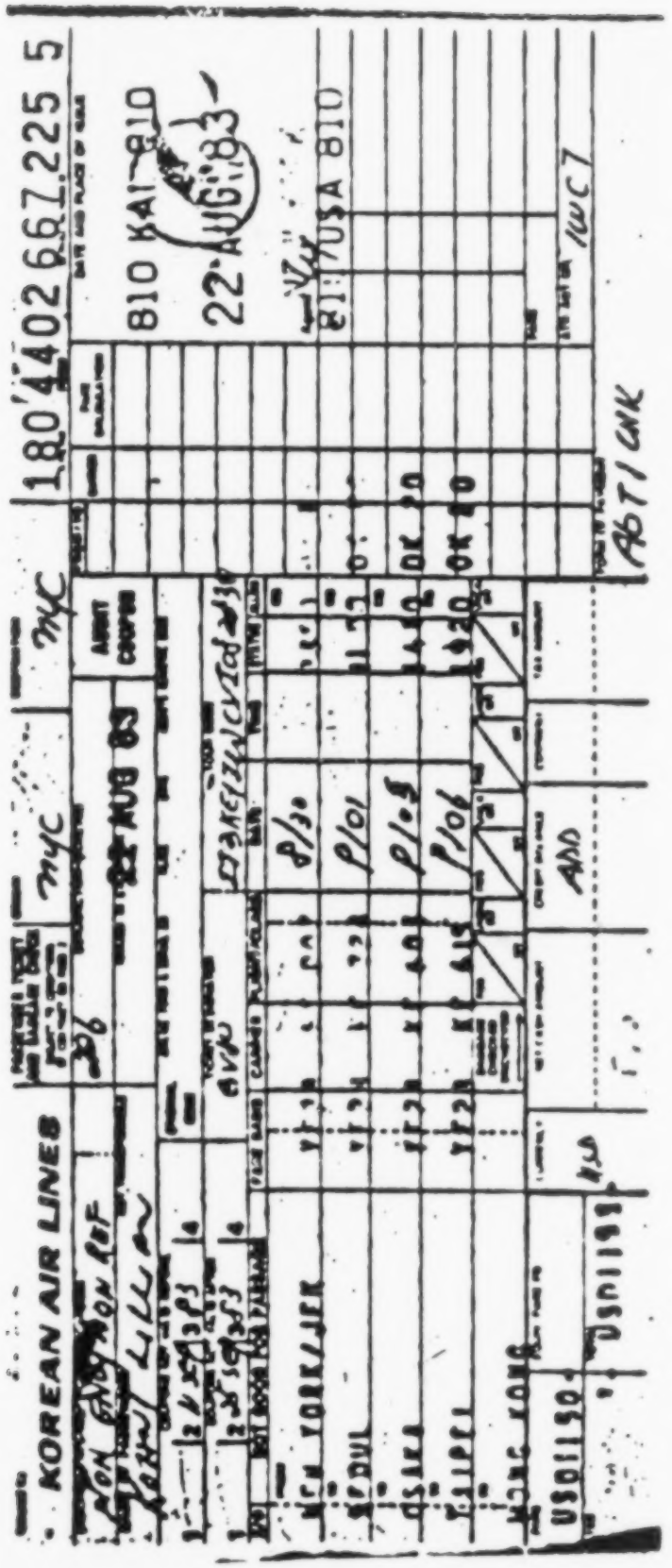
KOREAN AIR LINES, INC. and
THE UNITED STATES OF AMERICA,

Defendants

Sample Ticket Booklet Nos.: 4

[See Opposite →]





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MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3890
D.D.C.

IN JIG LIN, as Personal Representative of the Estate of SAN MEI LIN, Deceased, 84-48 56th Avenue, Amherst, N.Y. 11373

Plaintiff

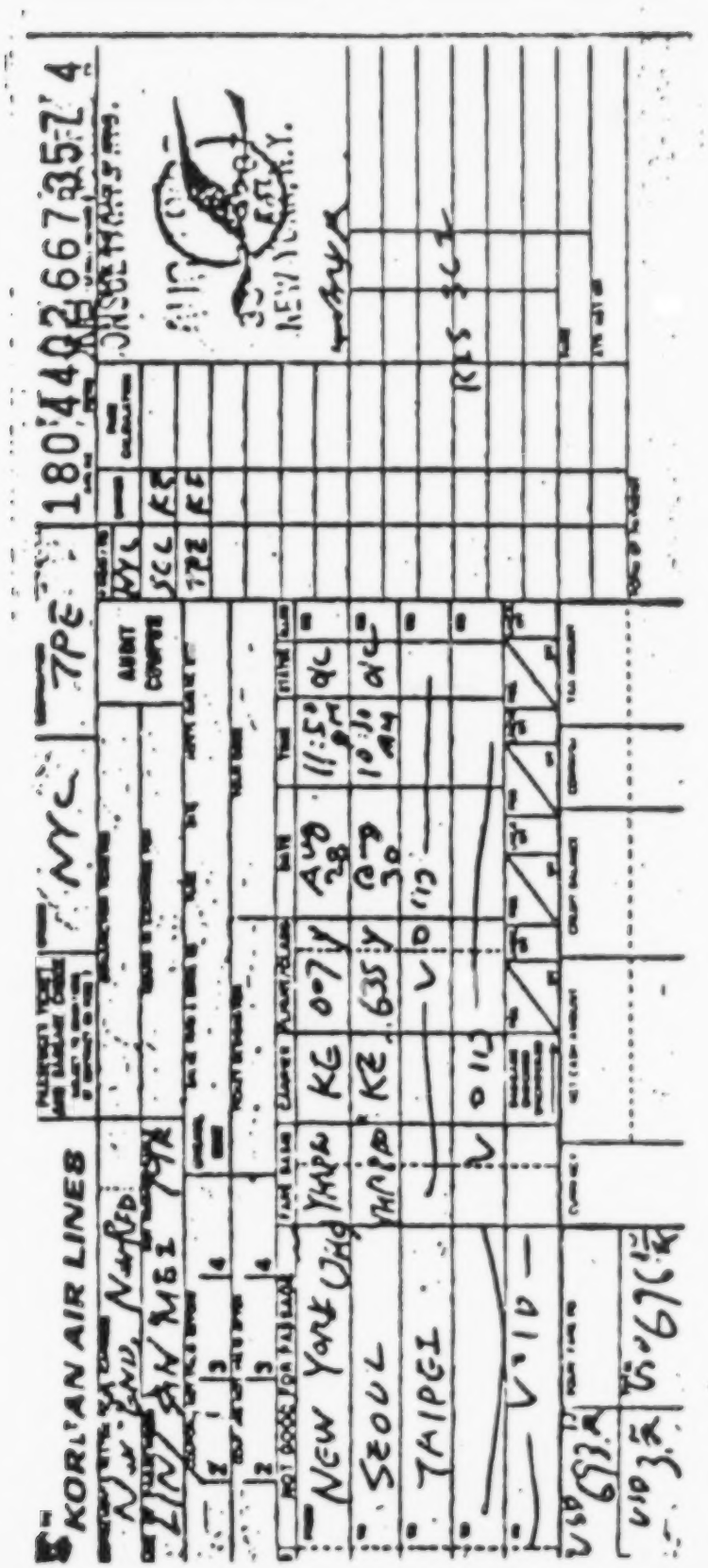
v.

KOREAN AIR LINES CO., LTD. and
THE UNITED STATES OF AMERICA,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3898
D.D.C.

LOUELLA MARIA ANTONIA DEFREITAS NASSIEF, as Administratrix of the Estate of ANTHONY NASSIEF, deceased,

Plaintiff,

—against—

KOREAN AIRLINES, INC., JOHN DOE I, Executor of the Estate of CHUN BYUNG IN, JOHN DOE II, Executor of the Estate of DONG HUI SOHN, JOHN DOE II, Executor of the Estate of EUI DONG KIM, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and THE UNION OF SOVIET SOCIALIST REPUBLICS.

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]

MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3902
D.D.C.

MARJORIE ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX UNDER THE ESTATE OF MURIEL A.M.S. KOLE, and MURIEL MAHALEK, MOTHER AND NEXT OF KIN OF MURIEL A.M.S. KOLE,

Plaintiffs,

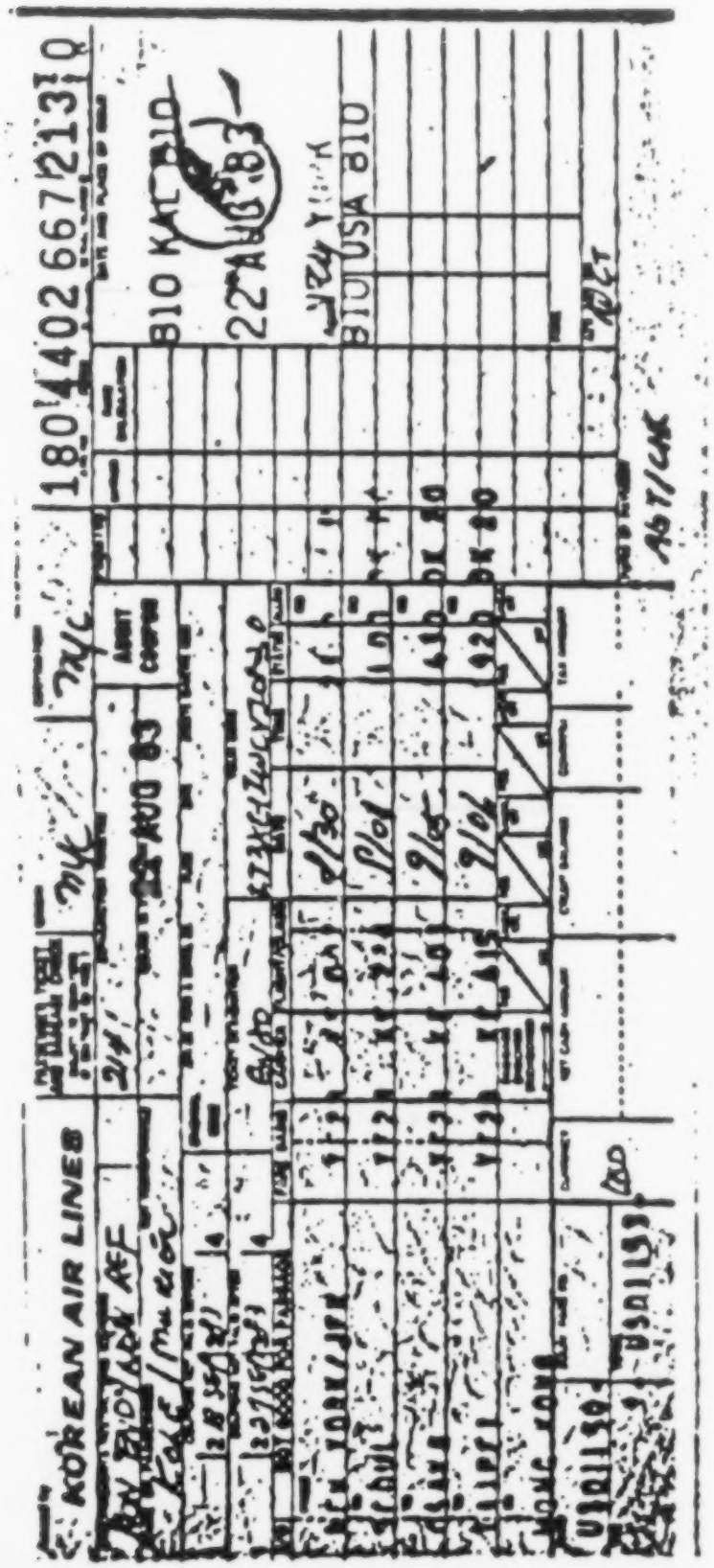
v.

KOREAN AIRLINES, INC., and
THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



83 Civ. 3903
Ticket Booklet No. 4

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MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 84-0029
D.D.C.

ROBERTA CRUZ, as Personal Representative and Executrix of the Estate of ALFREDO CRUZ, deceased,

Plaintiff,

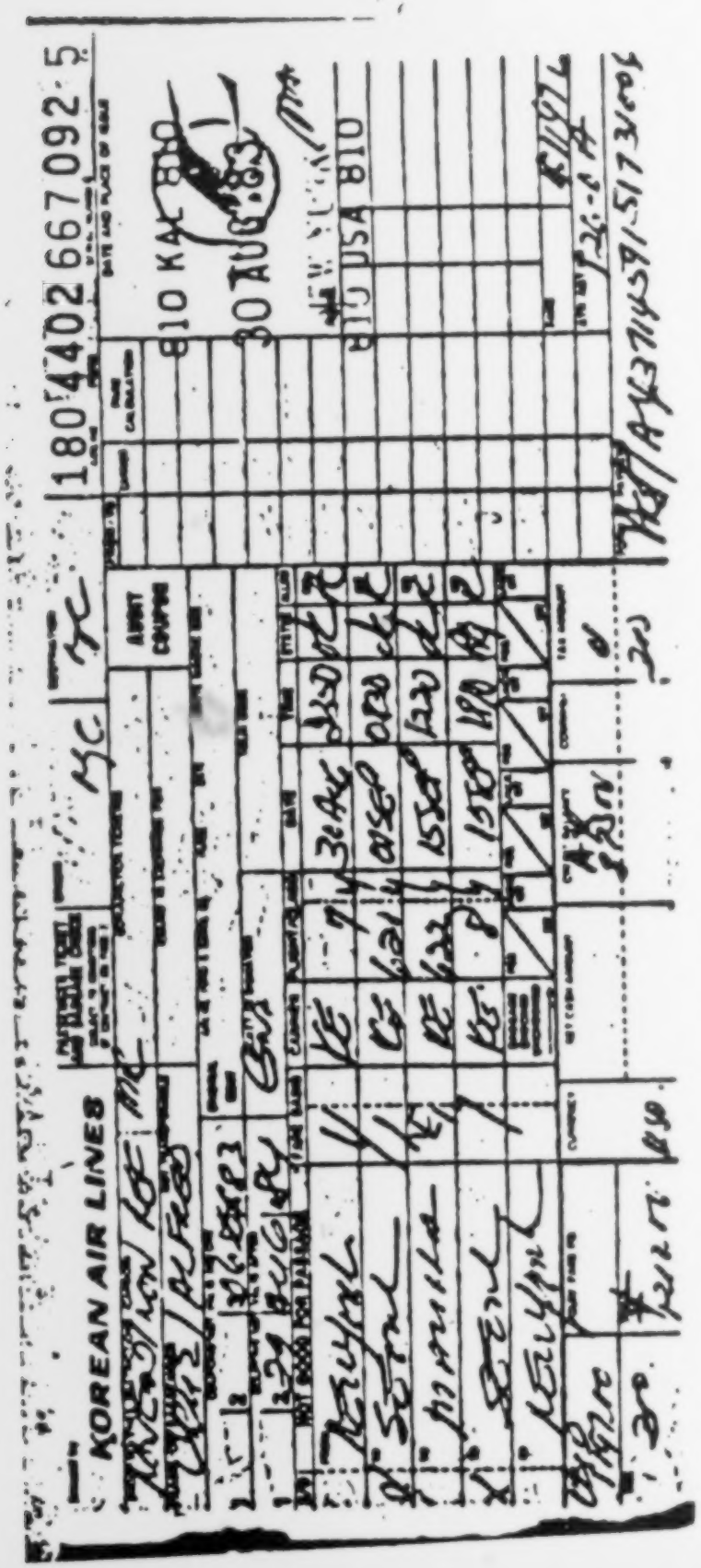
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



84 Civ. 0133
Sample Ticket Booklet No. 3

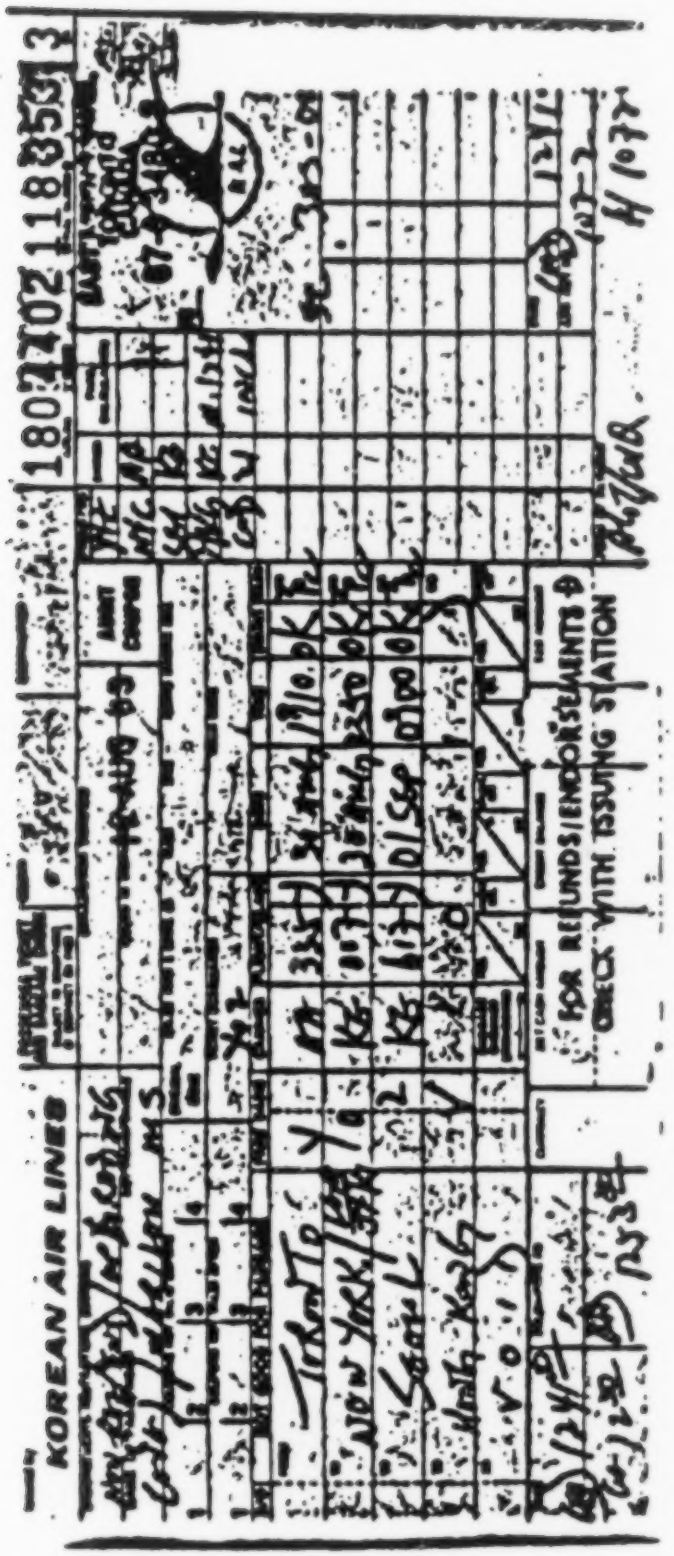


EXHIBIT 4

Sample Ticket Booklet "2"

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notices headed "Advice to International Passengers on Limitation of Liability" and "Baggage Liability."

CONDITIONS OF CONTRACT

1. As used in this contract "ticket" means the passenger ticket and baggage check or such one of these documents and the conditions of contract which are applicable to transportation hereunder. "Carrier" means all carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other services incidental to such carriage. "WARSAW CONVENTION" means the Convention for the unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on the 12th October 1929 or the Convention as amended at The Hague on 28th September 1955 whichever may be applicable.

2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that Convention.

3. To the extent not contrary to the foregoing carriage and other services performed by each carrier are subject to: (i) the conditions contained in this ticket, (ii) applicable tariffs, (iii) carrier's conditions of carriage and other regulations which are made part hereof and are available for inspection at the offices of carrier, except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables. Carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket. The agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route. If carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so as agent only.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft or other equipment carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint is to be made in writing to carrier forthwith after discovery of damage and, at the latest, within 7 days from receipt. In case of delay, complaint must be made within 21 days from date baggage has been delivered. See tariffs or conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue except where shorter periods are prescribed in the ticket or carrier's tariffs, conditions of carriage or regulations. Unless otherwise agreed, fare for carriage hereunder is subject to change prior to commencement of carriage. Unused ticket may not be honored for transportation if the applicable fare has been changed.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and do not form part of this contract. Carrier may without notice substitute alternate carriers or aircraft and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

10. Passenger shall comply with Government travel requirements, present all documents required by carrier or its agents and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

J.A.74

알 림

旅客의 最終目的地 또는 途中寄港地가 出発国以外의 他国内의 一個 地点일 境遇, 同旅客은 旅客의 死亡 또는 傷害 및 手荷物의 紛失 또는 毁傷에 対한 運送人의 責任을 法的으로 制限하는 "와르소條約"을 適用받을 수 있읍니다. 本航空券에 揭載된 "国際旅客에 対한 責任制限에 関한 告知"를 参照하시기 바랍니다.

契 約 條 件

1. 本 契約에서 使用되는 用語의 定義는 다음과 같읍니다. "航空券"이란 本 "旅客航空券 및 手荷物標"를 말하는 것으로서 本 契約條件 및 上記 事項은 本 航空券의 一部를 構成합니다. "運送"이란 無償運送을 말하며, 運送人 이란 旅客 또는 그의 手荷物을 本契約 條件에 따라 運送하거나 또는 運送을 目的하거나 또는 實際航空運送과 關聯되는 其他 서비스를 말하는 모든 航空運送人을 말합니다. "와르소條約"이란 1929年 10月 12日 "와르소"에서 署名된 國際航空運送에 関한 規則의 統一을 위한 條約" 또는 1955年 9月 28日 "헤이그"에서 改正된 와르소條約中 適用되는 條約을 말합니다.

2. 本 契約下의 運送이 와르소條約"에 定義된 國際輸送運送일 境遇 그 運送은 同 條約에서 定하고 있는 責任에 関한 制定 및 制限의 適用을 받읍니다.

3. 前 事項에 抵觸하지 않는 範圍內에서 上記 運送과 其他 모든 用役은 各 運送人이 各各 다음 事項의 適用을 받읍니다. (i) 本 航空券에 記載된 條件, (ii) 適用運賃, (iii) 運送人의 運送約款 및 關聯 諸規則. 이들 諸規則은 本 運送人의 營業所에서 閱覽할 수 있읍니다. 但 本 契約條件 第2條 第4項에 規定된 境遇는 例外로 합니다.

4. 運送人의 名稱은 航空券上에 略稱으로 表記할 수 있으며 正式名稱 및 그 略稱은 運送人의 運賃表, 運送約款, 諸規則 또는 時間表에 記載되어 있읍니다. 運送人의 住所는 航空券上의 運送人의 略稱名稱의 맞은편에 記載되어있는 出発空港을 말합니다. 旅客과 運送人間의 合意한 途中寄港地는 本 航空券上에 明示된 途中寄港地 또는 旅客의 旅行上에 表示된 途中 途中寄港地로서 運送人의 運送時刻表 등과 同一한 途中寄港地를 말합니다. 本 契約條件下에서 二個 以上의 運送人에 依하여 遂行되는 運送境遇는 單一 運送으로 看做합니다.

5. 他航空運送人을 爲한 航路 上의 運送을 爲하여 航空券을 發行하는 航空運送人은 단지 當該 航空運送人로 代理人으로서 航空券을 發行하는 것입니다.

6. 運送人의 責任 또는 責任制限에 関한 規定은 運送人의 代理人, 雇傭員 및 代理人 그리고 運送을 爲해 運送人이 使用하는 航空機의 所有者, 그의 代理人, 雇傭員 및 代理人 모두에게 適用합니다.

7. 登託手荷物은 手荷物票 所持者에게 引渡합니다. 國際運送으로 運送되는 手荷物에 關聯이 發生한 境遇 損害는 發見即時 書面으로, 또는 遲어도 手荷物을 受領한 날로부터 7日 以內에 運送人에게 書面으로 異議를 提起하여야 합니다. 遲延의 境遇는 手荷物을 受領한 날로부터 21日 以內에 異議를 提起해야 합니다. 國際輸送運送이 아닌 境遇는 國內線 規定 또는 運送約款을 參照하시기 바랍니다.

8. 本 航空券 運送人의 代理로 運送約款 또는 國際航空에 適用되 定期的 있는 境遇를 除外하고는 本 航空券은 發行日로부터 1年間 有效합니다. 別途約定上의 運送을 除한 運賃은 運送開始前 變更될 수 있읍니다. 適用한 運賃이 變更되지 않았을 境遇 運送人은 運送을 拒絶할수 있읍니다.

9. 運送人은 合理的 條件으로 旅客 및 手荷物을 運送하기 爲하여 最善의 努力을 할 義務를 지니다. 運航時刻表 또는 其他에 表示된 時刻은 確定은 것은 아니며 또한 本 契約의 一部를 構成하지도 않읍니다. 運送人은 必要에 依하여 運送人 또는 航空機를 變更할 수 있으며 또한 表示된 經由地는 航空券上에 表示한 途中寄港地를 變更하거나 省略할 수 있읍니다. 스케줄도 事前通知 없이 變更될 수 있읍니다. 運送人은 接續運送에 対하여 一切의 責任을 지지 않읍니다.

10. 旅客은 政府가 要한 旅行書類를 準備하여야 하며, 航空券 또는 運送人 또는 代理人 그 밖에 要求한 書類를 提示하여 運送人이 確定한 時刻까지 또는 時刻이 確定되지 않았을 境遇는 出発 手續을 完了할 수 있는 充分한 時間的 餘裕를 갖고 空港에 到着하여야 합니다.

11. 運送人의 被傭한 代理人, 雇傭員 또는 代理人도 本 契約의 被傭한 條文을 變更하거나 修正하거나 또는 拋棄할 權限을 가지지 않읍니다.

J.A.75

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline's insurance company representative.

NOTE: The limit of liability of U.S. $75,000, or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately U.S. $9.07 per pound ($20.00 per kilo) for checked baggage and U.S. $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S.A. points, to U.S. $750.00 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

J.A.76

國際線 旅客에 対한 責任制限에 関한 告知

旅客이 出発地国 以外의 国家内에 最終目的地 또는 途中着陸地를 둔 旅行을 할 境遇에는, 出発地国 또는 目的地国内의 国内線 全区間을 包含한 全体旅行에 対하여 所謂 와르소條約의 規定이 適用될 수 있읍니다. 同條約 및 有効한 타리프에 明示되어 있는 特別運送契約에 依해서 旅客이 目的地, 出発地 또는 合意된 途中着陸地를 美国内에 둔 旅行을 하는 境遇에, 大韓航空 및 当該特別契約의 当事者인 他運送人이 旅客의 死亡 또는 負傷에 対하여 지는 責任限度는 大部分의 境遇 旅客 1人当 美貨 75,000$ 또는 그 相当額을 超過하지 않는 範囲의 立証된 損害로 制限되며, 同 限度까지의 責任은 運送人側의 過失을 條件으로 하지 않는 것으로 規定되어 있읍니다. 当該特別契約의 当事者가 아닌 運送人에 依하여 旅行하는 旅客의 境遇, 또는 目的地, 出発地 또는 合意된 途中着陸地를 美国内에 두지 않는 旅行을 하는 旅客의 境遇, 旅客의 死亡 또는 負傷에 対한 運送人의 責任은 大部分의 境遇 旅客 1人当 美貨 約 10,000$ 또는 20,000$ 또는 그 相当額으로 制限됩니다. 当該特別契約의 当事者인 運送人의 名称은 当該運送人의 航空券発売事務所에 備置되어 있으며 旅客이 要請할 境遇에는 配置될 수 있읍니다. 個別保険의 加入하므로써 上記 賠償額에 追加하여 賠償을 받을 수 있읍니다. 이 保険은 와르소條約 또는 当該特別運送契約上의 運送人의 責任限度에 依하여 影響을 받지 않읍니다. 仔細한 것은 搭乗航空社 또는 保険会社의 職員과 相談하여 주시기 바랍니다.

註 : 上記의 責任限度額 美貨 75,000$또는 그 相当額은 訴訟費用 및 弁護士 報酬를 包含한 金額입니다. 但 訴訟費用 및 弁護士 報酬를 別途로 規定하는 国家에서 提起된 賠償請求의 境遇 그 限度額은 訴訟費用 및 弁護士 報酬를 除外한 美貨 58,000$ 또는 그 相当額입니다.

J.A.77

手荷物 賠償 責任 限度

旅客이 도다 높은 価格을 事前에 申告하고 그에 따른 追加料金을 支拂하지 않는 限, 手荷物의 紛失, 遅延 또는 損傷에 対한 航空社의 責任限度額은 다음과 같읍니다.

(1) 大部分의 国際線旅行 国際線旅行의 一部을 構成하는 国内線 旅行区間을 包含한 에 対해서는, 委託手荷物의 境遇 1킬로그람当 美貨 20$ 1파운드当 美貨 9.07$ 船舶託手荷物 旅客이 客室内로 持入하는 手荷物 의 境遇 旅客 1人当 美貨 400$

(2) 美国内의 純粋들 旅行에 対해서는 大部分의 航空社의 境遇 旅客 1人当 美貨 750$ 責任限度가 이보다 낮은 航空社도 있읍. 어떤 種類의 高価品는 에 対하서는 限度額을 超過하는 価格을 申告할 수 있읍니다. 航空社는 破損 또는 腐敗되기 쉬운 品目에 対해서는 責任을 지지 않읍니다. 仔細한 것은 当該 航空社에 問議하시기 바랍니다.

註 : 上記의 '어떤 種類의 高価品'은 貨幣, 宝石類, 金銀製品, 時計類, 毛皮, 또는 電子機器를 말합니다.

本 航空券上에 表記된 한줄 通知文은 当社의 運送約款에서 発生 또는 関連한 内容으로 国際的 解釈上 異見이 있을 時에는 当社의 運送約款을 基本으로합니다.

RETURN & ONWARD RESERVATIONS

IF YOU BREAK YOUR JOURNEY FOR MORE THAN 72 HOURS AT ANY POINT, PLEASE RECONFIRM YOUR INTENTION OF USING YOUR CONTINUING OR RETURN RESERVATION.
TO DO SO, PLEASE INFORM THE AIRLINE OFFICE AT THE POINT WHERE YOU INTEND TO RESUME YOUR JOURNEY AT LEAST 72 HOURS BEFORE DEPARTURE OF YOUR FLIGHT.
FAILURE TO RECONFIRM WILL RESULT IN THE CANCELLATION OF YOUR RESERVATION(S).
IF YOUR JOURNEY IS WHOLLY WITHIN EUROPE THIS NOTICE DOES NOT APPLY TO YOU.

TICKET RESTRICTION

Certain fares (mostly discounted fares for excursion, group, inclusive tour, Budget or Apex) restrict the validity of your tickets, the dates of your journeys or voluntary changes of routing. When in doubt, please check with your booking office.

APPLICATION FOR REFUND

Application for refund should be made during the period of validity of the ticket, exchange order or miscellaneous charges order, and Korean Air Lines Co., Ltd. reserves the right to refuse refund when application therefor is made more than thirty (30) days after expiration date of the ticket, exchange order or miscellaneous charges order.

DANGEROUS ARTICLES

It is dangerous and therefore forbidden to take any of those articles as listed below in passenger's baggage, either checked or unchecked.

Explosives, Compressed gases, Flammable liquids and solids (including matches or lighter fuel in large quantities), Corrosives, Radioactive materials, Magnetized materials, Offensive or irritating substances and other articles liable to damage aircraft, persons and properties loaded.

Firearms, swords and other similar items should not be carried in cabin. Further information is available on request.

COUPON SEQUENCE

Flight coupons must be used in sequence from the place of departure as shown on the passenger's coupon.

J.A.78

復便 또는 接続航空便의 予約 再確認 (매우 重要합니다)

貴下의 目的地 또는 途中滯留地에서 72時間(3日)以上 滯留할 境遇에는, 予約된 航空便의 出発 72時間前까지 貴下의 復便 또는 継続 旅行할 航空便의 予約을 반드시 再確認하여 주시기 바랍니다.

旅行을 다시 開作하고자 하는 都市에 있는 利用航空社 営業所에 直接 가시거나 또는 電話, 電報等으로 予約을 再確認하여도 無妨합니다. 만약 予約을 再確認하지 않을 境遇에는 航空社 任意로 貴下의 予約을 取消할 것임으로 이 点에 留意하여 주시기 바랍니다. 유럽内에서만 旅行하시는 境遇에는 予約의 再確認이 必要없읍니다만 上記와 같은 方法으로 再確認할 것을 勧하는 바입니다.

航空券 制限 事項

어떤 運賃 大部分 割引된 運賃임)을 支拂한 航空券은 그 有効期間, 貴下의 旅行日程 또는 自発的인 経路変更等이 制限되어 있읍니다.

還 拂 申 請

還拂申請은 航空券 또는 MCO(Miscellaneous Charge Order)의 有効期間中에 하셔야 합니다. 航空券 또는 MCO의 有効期間 満了後 30日 以上이 経過한 後에 還拂을 申請할 境遇, 大韓航空은 還拂을 拒絶할 権利를 가집니다.

危險品目 機內 持入 禁止

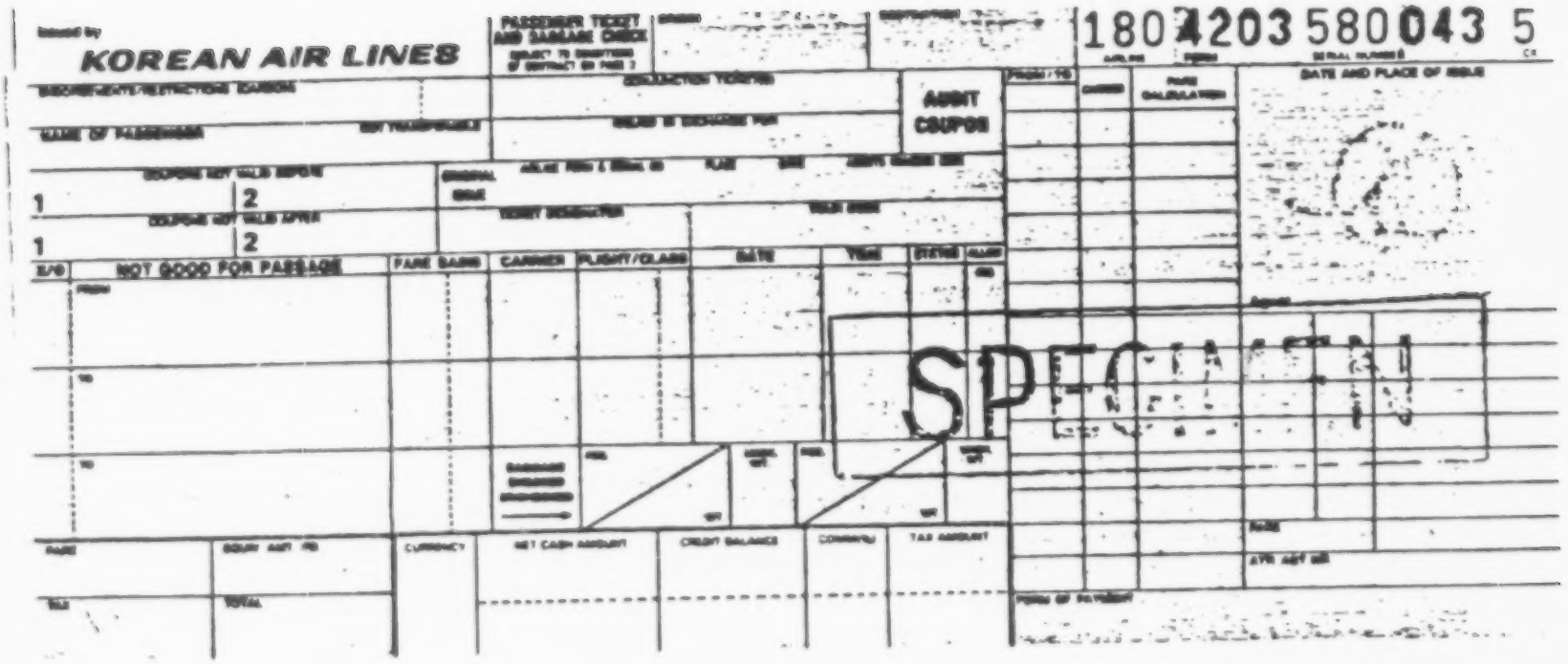
下記 品目은 危險品目이므로 旅客의 手荷物 委託手荷物이든 非委託手荷物이든)内에 넣어 機内 持入이 禁止되어 있읍니다.

爆発物, 圧縮까스, 引火性物質(多量의 성냥 또는 라이타기름 包含), 腐蝕性物質, 放射性物質, 磁気性物質, 機客에게 不快感을 주는 物質, 그리고 航空機, 機客, 機務員 및 搭載財産에 損傷을 주기 쉬운 其他 物質, 銃砲, 刀劍 및 其他 類似品目들은 客室内에 持参할 수 없읍니다. 仔細한 것은 航空社에 問議하여 주십시요.

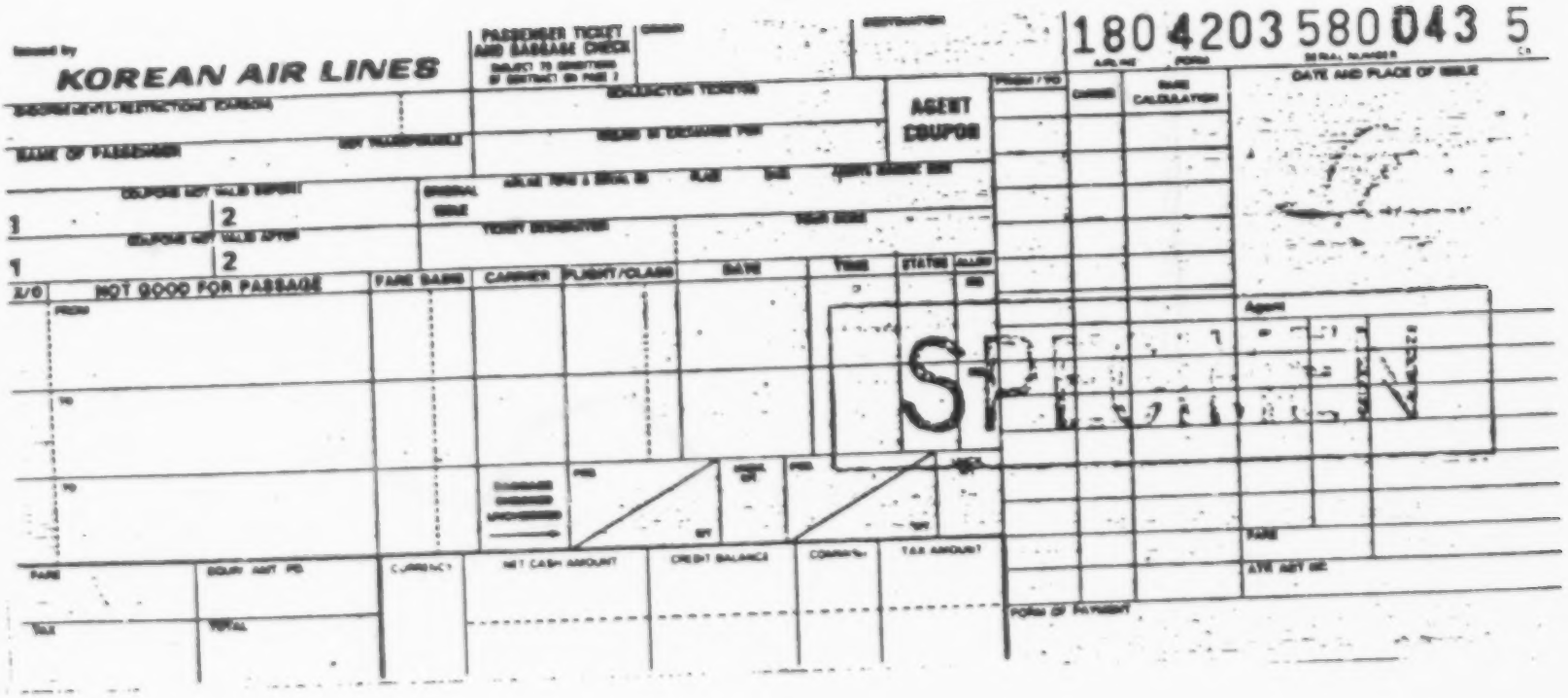
搭乘 쿠폰 使用 順序

搭乗用 쿠폰은 旅客用 쿠폰에 記載되어 있는대로 出発地부터 順序에 따라 使用하셔야 합니다.

J.A.79


Issued by
KOREAN AIR LINES
PASSENGER TICKET AND BAGGAGE CHECK
1804203580043 5
AGENT COUPON
1
2
1
2
NOT GOOD FOR PASSAGE
SPECIMEN

J.A.80


Issued by
KOREAN AIR LINES
PASSENGER TICKET AND BAGGAGE CHECK
1804203580043 5
AGENT COUPON
1
2
1
2
NOT GOOD FOR PASSAGE
SPECIMEN

J.A.81

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4203580043 2

FLIGHT COUPON 1

180 4203580043 2

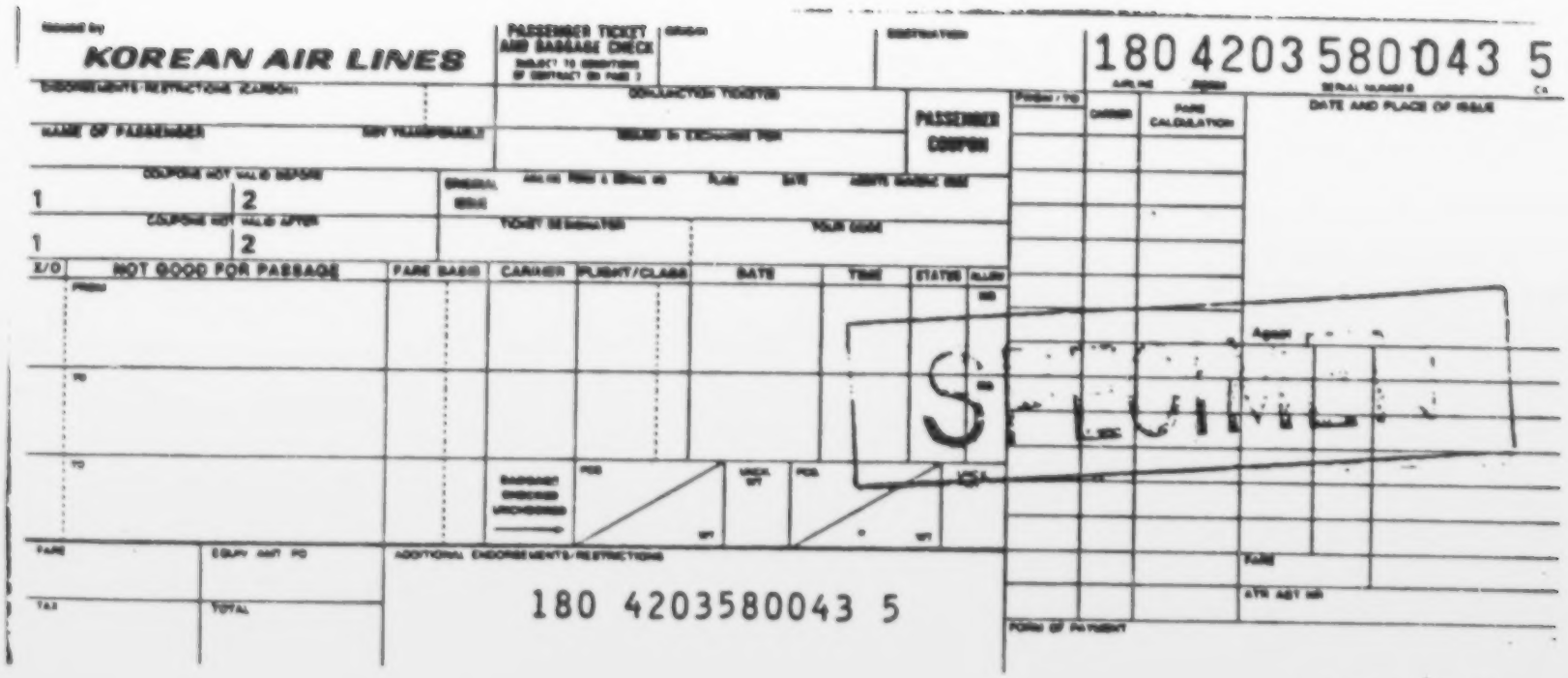
KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4203580043

FLIGHT COUPON 2

180 4203580043 6



J.A.84

Sample Ticket Booklet "3"

J.A.85

NOTICE

[illegible] ultimate destination or stop in a country other than the country of departure the Warsaw Convention may [illegible] and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage [illegible] applies. Advice to International Passengers on Limitation of Liability" and "Baggage Liability."

CONDITIONS OF CONTRACT

[illegible] means the passenger ticket and baggage check [illegible] carriage [illegible] transportation [illegible] to carry the passenger on the [illegible] to such carriage. "WARSAW [illegible] Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 or that Convention as amended [illegible] to the extent [illegible] to be applicable.

2 Carriage and other services performed by each carrier are subject to rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that Convention.

3 To the extent not in conflict herewith, the foregoing carriage and other services performed by each carrier are subject to all applicable tariffs, rules, regulations and conditions of carriage [illegible] carrier except in transportation between [illegible] and any place outside thereof to which tariffs in [illegible]

4 Carrier is authorized to issue, in connection with carriage, [illegible] if the ticket, the full name and its abbreviation [illegible] terminations of carriage regulations or timetables, carrier's [illegible] opposite the first abbreviation of carrier's [illegible] agreed stopping places are those places set forth in this ticket or as [illegible] carrier for stopping places on the passenger's route. [illegible] successive carriers is regarded as a single [illegible]

5 [illegible] the lines of another air carrier does so

6 Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives [illegible]

7 Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation, complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within 7 days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs or conditions of carriage regarding nonperformance, [illegible] transportation.

8 This ticket is good for carriage for one year from date of issue except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

9 Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft and may alter or omit stopping places shown on the ticket. In case of necessity, carrier is authorized to make any [illegible] subject to change without notice. Carrier assumes no responsibility for making connections.

10 Passenger shall comply with Government travel requirements, present any passport, visa or other required documents and arrive at airport by the time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11 No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

J.A.86

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알 림

[illegible] 또는 [illegible] 出発国以外의 他国内의 一箇所 또는 寄港地를 国際旅客은 旅客의 死亡 또는 傷害 및 手荷物의 紛失 또는 破損에 対한 [illegible] 責任을 制限하는 것으로 制限하는 "国際線旅客에 対한 責任制限에 関한 告知 를 参照하시기 바랍니다. 本航空券에 明記된 "国際線旅客에 対한 責任制限에 関한 告知" 를 適用한 수 있읍니다.

契 約 條 件

1 [illegible] 旅客의 航空券 및 手荷物 引換証 [illegible] 運送 [illegible] 運送 [illegible] 運送

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000 or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately U.S. $9.07 per pound ($20.00 per kilo) for checked baggage and U.S. $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S.A. points, to U.S. $750.00 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

J.A.88

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國際線 旅客의 對한 責任制限에 關한 告知

J.A.89

RETURN & ONWARD RESERVATIONS

IF YOU BREAK YOUR JOURNEY FOR MORE THAN 72 HOURS AT ANY POINT, PLEASE RECONFIRM YOUR INTENTION OF USING YOUR CONTINUING OR RETURN RESERVATION

TO DO SO, PLEASE INFORM THE AIRLINE OFFICE AT THE POINT WHERE YOU INTEND TO RESUME YOUR JOURNEY AT LEAST 72 HOURS BEFORE DEPARTURE OF YOUR FLIGHT

FAILURE TO RECONFIRM WILL RESULT IN THE CANCELLATION OF YOUR RESERVATION(S)

IF YOUR JOURNEY IS WHOLLY WITHIN EUROPE THIS NOTICE DOES NOT APPLY TO YOU

NOT ALL AIRLINES REQUIRE RECONFIRMATION

TICKET RESTRICTION

Certain fares (mostly discounted fares for excursion, group, inclusive tour, Budget or Apex) restrict the validity of your tickets, the dates of your journeys or voluntary changes of routing. When in doubt, please check with your booking office.

APPLICATION FOR REFUND

Application for refund should be made during the period of validity of the ticket, exchange order or miscellaneous charges order, and Korean Air Lines Co. Ltd. reserves the right to refuse refund when application therefor is made more than thirty (30) days after expiration date of the ticket, exchange order or miscellaneous charges order.

DANGEROUS ARTICLES

It is dangerous and therefore forbidden to take any of those articles as listed below in passenger's baggage, either checked or unchecked.

Explosives, Compressed gases, Flammable liquids and solids (including matches or lighter fuel in large quantities), Corrosives, Radioactive materials, Magnetized materials, Offensive or irritating substances and other articles liable to damage aircraft, persons and properties loaded.

Firearms, swords and other similar items should not be carried in cabin. Further information is available on request.

COUPON SEQUENCE

Flight coupons must be used in sequence from the place of departure as shown on the passenger's coupon.

J.A.90

復便 또는 接続航空便의 予約 再確認 (매우 重要합니다)

貴下의 目的地 또는 途中滞留地에서 72時間(3日)以上 滞留할 境遇에는 予約된 航空便의 出発 72時間前까지 貴下의 復便 또는 継続 旅行할 航空便의 予約을 반드시 再確認하여 주시기 바랍니다.

旅行을 다시 開作하고자 하는 都市에 있는 利用航空社 営業所에 直接 가시거나 또는 電話, 電報等으로 予約을 再確認하여도 無妨합니다. 만약 予約을 再確認하지 않을 境遇에는 航空社 任意로 貴下의 予約을 取消할 것임으로 이 点에 留意하여 주시기 바랍니다. 유럽内에서만 旅行하시는 境遇에는 予約의 再確認이 必要없읍니다만 上記와 같은 方法으로 再確認할 것을 勧하는 바입니다.

다른 모든 航空社도 이 規定을 꼭 適用하는 것은 아닙니다.

航空券 制限 事項

어떤 運賃 大部分 割引된 運賃임)을 直接한 航空券은 그 有効期間, 貴下의 旅行日程 또는 自意的인 経路変更等이 制限되어 있읍니다.

還 拂 申 請

還拂申請은 航空券 또는 MCO(Miscellaneous Charge Order)의 有効期間中에 하셔야 합니다. 航空券 또는 MCO의 有効期間 満了後 30日 以上이 経過한 後에 還拂을 申請할 境遇, 大韓航空은 還拂을 拒絶할 権利를 가집니다.

危險品目 機内 持入 禁止

下記 品目은 危險品目이므로 旅客의 手荷物(委託手荷物이든 非委託手荷物이든)内에 넣어 機内 持入이 禁止되어 있읍니다.

爆発物, 圧縮가스, 引火性物質(多量의 성냥 또는 라이타기름 包含), 腐蝕性物質, 放射性物質, 磁気性物質, 旅客에게 不快感을 주는 物質, 그리고 航空機, 乗客, 乗務員 및 搭載財産에 損傷을 주기 쉬운 其他 物質, 銃砲, 刀剣 및 其他 類似品目들은 客室内에 持参할 수 없읍니다 仔細한 것은 航空社에 問議하여 주십시요.

搭乘 쿠폰 使用 順序

搭乗用 쿠폰은 旅客用 쿠폰에 記載되어 있는대로 出発地부터 順序에 따라 使用하셔야 합니다.

J.A.91

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 1

ORIGIN

DESTINATION

180 4402 568030 0

AIRLINE CODE | FORM CODE | SERIAL NUMBER | CK

ENDORSEMENTS/RESTRICTIONS (CARRIER)

NAME OF PASSENGER

NOT TRANSFERABLE

CONJUNCTION TICKET(S)

ISSUED IN EXCHANGE FOR

AGENT COUPON

FROM / TO

CARRIER

FARE CALCULATION

DATE AND PLACE OF ISSUE

COUPONS NOT VALID BEFORE

1 | 2 | 3 | 4

ORIGINAL ISSUE

AIRLINE CODE NUMBER & SERIAL NO. | PLACE | DATE | AGENTS NUMERIC CODE

COUPONS NOT VALID AFTER

1 | 2 | 3 | 4

TICKET DESIGNATOR | FOR USE

S/O | NOT GOOD FOR PASSAGE | FARE BASIS | CARRIER | FLIGHT/CLASS | DATE | TIME | STATUS | ALLOW

FROM

TO

TO

TO

TO

BAGGAGE CHECKED WITH/WHEN

FREE | WEIGHT/PCS | FREE | WEIGHT/PCS | FREE | WEIGHT/PCS | FREE | WEIGHT/PCS

PCS WT | PCS WT | PCS WT | PCS WT

FARE

EQUIV FARE PD

CURRENCY

NET CASH AMOUNT

CREDIT BALANCE

COMMISSION

TAX AMOUNT

Agent

TAX

TOTAL

FARE

ATB ABT OR

FORM OF PAYMENT

J.A.92

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 1

ORIGIN

DESTINATION

180 4402 568030 0

AIRLINE CODE | FORM CODE | SERIAL NUMBER | CK

ENDORSEMENTS/RESTRICTIONS (CARRIER)

NAME OF PASSENGER

NOT TRANSFERABLE

CONJUNCTION TICKET(S)

ISSUED IN EXCHANGE FOR

AGENT COUPON

FROM / TO

CARRIER

FARE CALCULATION

DATE AND PLACE OF ISSUE

COUPONS NOT VALID BEFORE

1 | 2 | 3 | 4

ORIGINAL ISSUE

AIRLINE CODE NUMBER & SERIAL NO. | PLACE | DATE | AGENTS NUMERIC CODE

COUPONS NOT VALID AFTER

1 | 2 | 3 | 4

TICKET DESIGNATOR | FOR USE

S/O | NOT GOOD FOR PASSAGE | FARE BASIS | CARRIER | FLIGHT/CLASS | DATE | TIME | STATUS | ALLOW

FROM

TO

TO

TO

TO

BAGGAGE CHECKED WITH/WHEN

FREE | WEIGHT/PCS | FREE | WEIGHT/PCS | FREE | WEIGHT/PCS | FREE | WEIGHT/PCS

PCS WT | PCS WT | PCS WT | PCS WT

FARE

EQUIV FARE PD

CURRENCY

NET CASH AMOUNT

CREDIT BALANCE

COMMISSION

TAX AMOUNT

Agent

TAX

TOTAL

FARE

ATB ABT OR

FORM OF PAYMENT

J.A.93

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4402568030 4

FLIGHT COUPON 1

180 4402568030 4

J.A.94

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4402568030 1

FLIGHT COUPON 2

180 4402568030 1

J.A.95

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4402568030 5

FLIGHT COUPON 3

180 4402568030 5

J.A.96

Issued by

KOREAN AIR LINES

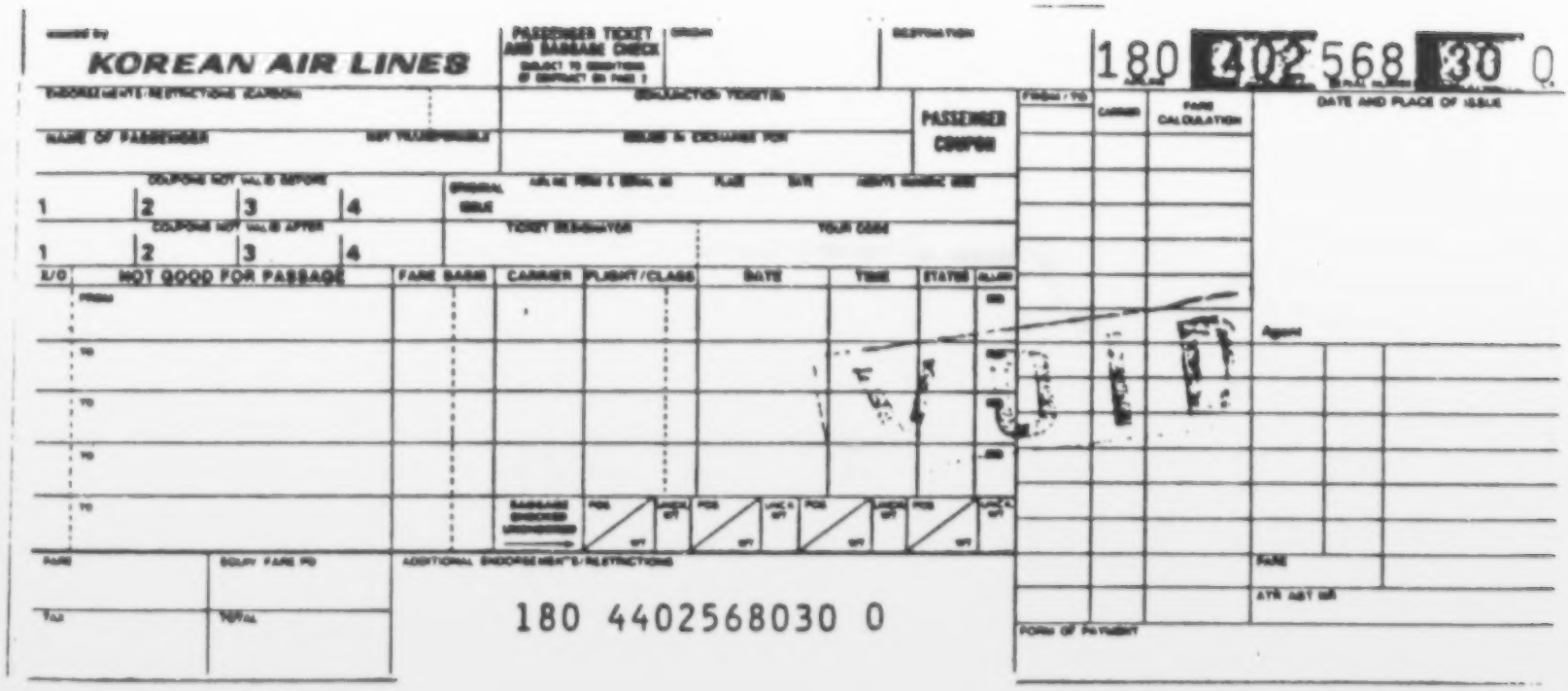
PASSENGER TICKET AND BAGGAGE CHECK

180 4402568030 2

FLIGHT COUPON 4

180 4402568030 2

J.A.97



J.A.98

Sample Ticket Booklet "4"

J.A.99

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NOTICE

[illegible] an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be [illegible] and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. [illegible] Advice to International Passengers on Limitation of Liability and Baggage [illegible]

CONDITIONS OF CONTRACT

[illegible]

입 림

[illegible]

契 約 條 件

[illegible]

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ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and specific contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000 or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately U.S. $9.07 per pound ($20.00 per kilo) for checked baggage and U.S. $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S.A. points, to U.S. $750.00 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

J.A.102

國際線 旅客에 対한 責任制限에 関한 告知

旅客의 一部終点 또는 停留地가 出発地 또는 目的地国内의 国内線 全区間을 포함한 全行程에 対하여도 適用됩니다. 例를 들면 国内線 区間만을 포함한 旅行을 할 境遇에는, 出発地国 또는 目的地国内의 国内線 全区間을 포함한 全行程에 対하여도 適用됩니다. 国際条約 및 特定한 契約에 明示되어 있는 特別運送契約에 依해서 旅客이 目的地 出発地 또는 合意된 途中着陸地点 등을 가는 旅行을 하는 境遇에, 大韓航空 및 運航特別契約의 当事者인 他運送人이 旅客의 死亡 또는 負傷에 対하여 지는 責任限度는 大部分의 境遇 旅客 1人当 約 75,000$ 또는 그 相当金額을 超過하지 않는 範囲의 立証된 損害로 制限되며 同 限度까지의 責任은 運送人側의 過失을 要件으로 하지 않는 것으로 規定되어 있읍니다. 運航特別契約의 当事者가 아닌 運送人에 依하여 旅行하는 旅客의 境遇, 또는 目的地, 出発地 또는 合意된 途中着陸地点을 美国内에 두지 않는 旅行을 하는 旅客의 境遇, 旅客의 死亡 또는 負傷에 対한 運送人의 責任은 大部分의 境遇 旅客 1人当 約 10,000$ 또는 20,000$ 또는 그 相当額으로 制限됩니다. 運航特別契約의 当事者인 運送人의 名称은 運送人의 航空券発売事務所에 備置되어 있으며 旅客이 要請할 境遇에는 閲覧할 수 있읍니다. 個別的인 保険에 加入하므로서 上記 制限額이 適用하여 補償을 받을 수 있읍니다. 이 保険은 私企業에 依하므로 運航特別運送契約上의 運送人은 責任制限에 関係없이 保険에 加入하여 주시기 바랍니다.

注: 上記의 責任限度額 約 75,000$ 또는 그 相当額은 訴訟費用 및 弁護士 報酬를 포함한 金額입니다. 但 訴訟費用 및 弁護士 報酬를 別途로 規定하는 国家에서 提起된 訴訟의 境遇에는 訴訟費用 및 弁護士 報酬를 除外한 金額 56,000$ 또는 그 相当額입니다.

手荷物 賠償 責任 限度

旅客이 또다 들은 손해를 통知 또는 배상하고 그에 따른 追加요금을 포함하지 않는 限, 手荷物의 紛失, 遅延 또는 損傷에 対한 航空社의 責任限度額은 다음과 같읍니다.

(1) 모든 국제 運送(航空社 連絡運送이나 一部를 構成하는 国内線 旅行区間을 포함함)에 対해서는, 委託手荷物의 境遇 1킬로그람当 金額 20$ 1파운드当 金額 9.07$ 또는 旅客1人当 金額 400$ (託送手荷物 旅客이 携帯하는 手荷物도 포함)

(2) 美国内만 運送을 하는 旅行에 対해서는 大部分의 航空社의 境遇, 旅客 1人当 金額 750$ 責任限度가 이보다 높은 航空社도 있음. 어떤 種類의 物品에 対해서는 限度額을 超過하는 評価를 받을 수 없읍니다. 航空社는 破損 또는 腐敗되기 쉬운 品目에 対해서는 責任을 지지 않읍니다. 仔細한 것은 当該 航空社에 問合하시기 바랍니다.

注: 上記의 一般的 制限사항은 宝石類, 金銀製品, 現金, 旅券 또는 重要書類를 包含합니다.

本 航空券上에 明記한 한국 運送文은 当社와 運送契約을 締結 또는 証明한 内容으로 法律的 解釈上 異見이 있을 時에는 当社의 運送約款을 基本으로합니다.

J.A.103

RETURN & ONWARD RESERVATIONS

IF YOU BREAK YOUR JOURNEY FOR MORE THAN 72 HOURS AT ANY POINT, PLEASE RECONFIRM YOUR INTENTION OF USING YOUR CONTINUING OR RETURN RESERVATION

TO DO SO, PLEASE INFORM THE AIRLINE OFFICE AT THE POINT WHERE YOU INTEND TO RESUME YOUR JOURNEY AT LEAST 72 HOURS BEFORE DEPARTURE OF YOUR FLIGHT

FAILURE TO RECONFIRM WILL RESULT IN THE CANCELLATION OF YOUR RESERVATION(S)

IF YOUR JOURNEY IS WHOLLY WITHIN EUROPE THIS NOTICE DOES NOT APPLY TO YOU

NOT ALL AIRLINES REQUIRE RECONFIRMATION

TICKET RESTRICTION

Certain fares (mostly discounted fares for excursion, group inclusive tour, Budget or Apex) restrict the validity of your tickets, the dates of your journeys or voluntary changes of routing. When in doubt, please check with your booking office.

APPLICATION FOR REFUND

Application for refund should be made during the period of validity of the ticket, exchange order or miscellaneous charges order, and Korean Air Lines Co., Ltd. reserves the right to refuse refund when application therefor is made more than thirty (30) days after expiration date of the ticket, exchange order or miscellaneous charges order.

DANGEROUS ARTICLES

It's dangerous, and therefore forbidden to take any of those articles as listed below in passenger's baggage, either checked or unchecked.

Explosives, Compressed gases, Flammable liquids and solids (including matches or lighter fuel in large quantities), Corrosives, Radioactive materials, Magnetized materials, Offensive or irritating substances and other articles liable to damage aircraft, persons and properties loaded.

Firearms, swords and other similar items should not be carried in cabin. Further information is available on request.

COUPON SEQUENCE

Flight coupons must be used in sequence from the place of departure as shown on the passenger's coupon.

J.A.104

復便 또는 接続航空便의 予約 再確認 (매우 重要합니다)

貴下의 目的地 또는 途中滞留地에서 72時間(3日)以上 滞留할 境遇에는, 予約된 航空便의 出発 72時間前까지 貴下의 復便 또는 継続 旅行할 航空便의 予約을 반드시 再確認하여 주시기 바랍니다.

旅行을 다시 継続하고자 하는 都市에 있는 利用航空社 営業所에 直接 가시거나 또는 電話, 電報等으로 予約을 再確認하여도 無妨합니다. 만약 予約을 再確認하지 않을 境遇에는 航空社 任意로 貴下의 予約을 取消할 것임으로 이 点에 留意하여 주시기 바랍니다. 유럽内에서만 旅行하시는 境遇에는 予約의 再確認이 必要없읍니다만 上記와 같은 方法으로 再確認할 것을 勧하는 바입니다.

다른 모든 航空社도 이 規定을 꼭 適用하는 것은 아닙니다.

航空券 制限 事項

어떤 運賃 大部分 割引된 運賃임 을 支拂한 航空券은 그 有効期間, 貴下의 旅行日程 또는 自発的인 経路変更等이 制限되어 있읍니다.

還 拂 申 請

還拂申請은 航空券 또는 MCO(Miscellaneous Charge Order)의 有効期間中에 하셔야 합니다. 航空券 또는 MCO의 有効期間 満了後 30日 以上이 経過한 後에 還拂을 申請할 境遇, 大韓航空은 還拂을 拒絶할 権利를 가집니다.

危険品目 機内 持入 禁止

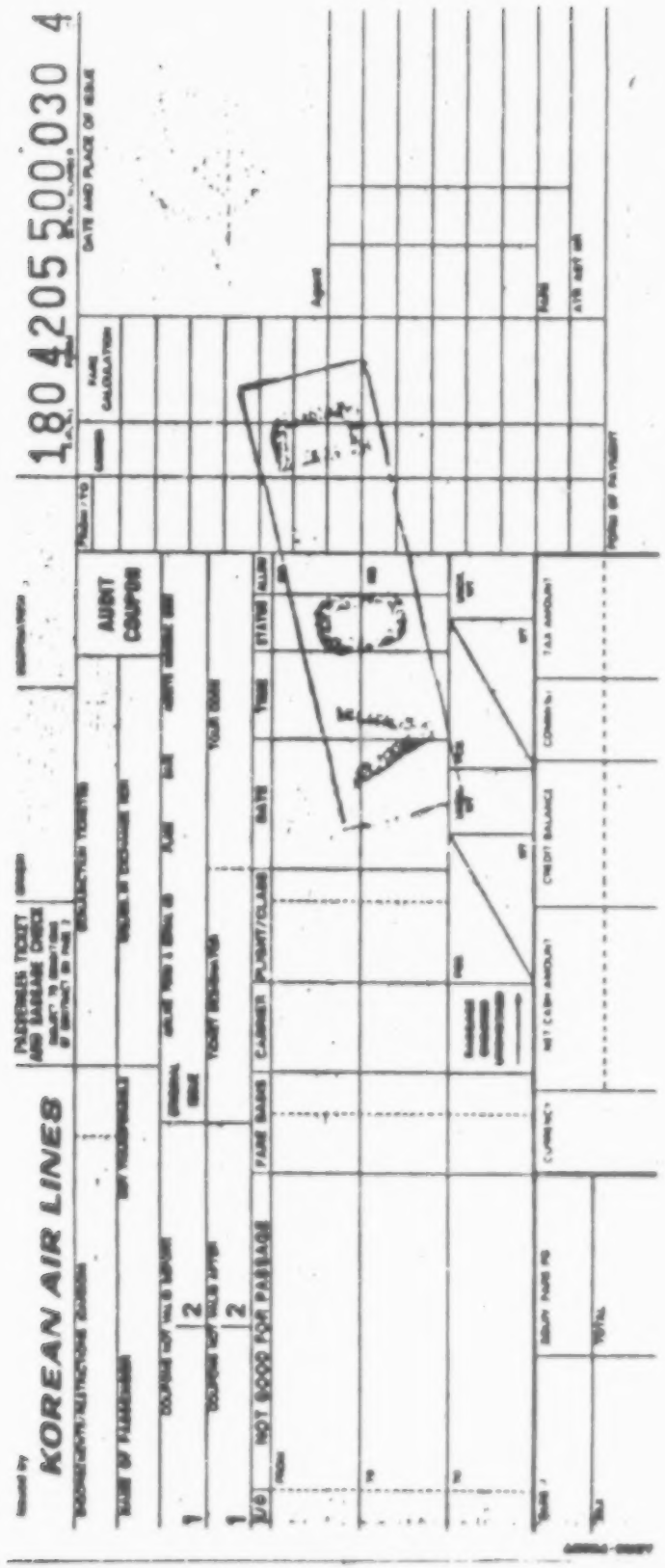
下記 品目은 危険品目이므로 旅客의 手荷物(委託手荷物이든 非委託手荷物이든)内에 넣어 機内 持入이 禁止되어 있읍니다.

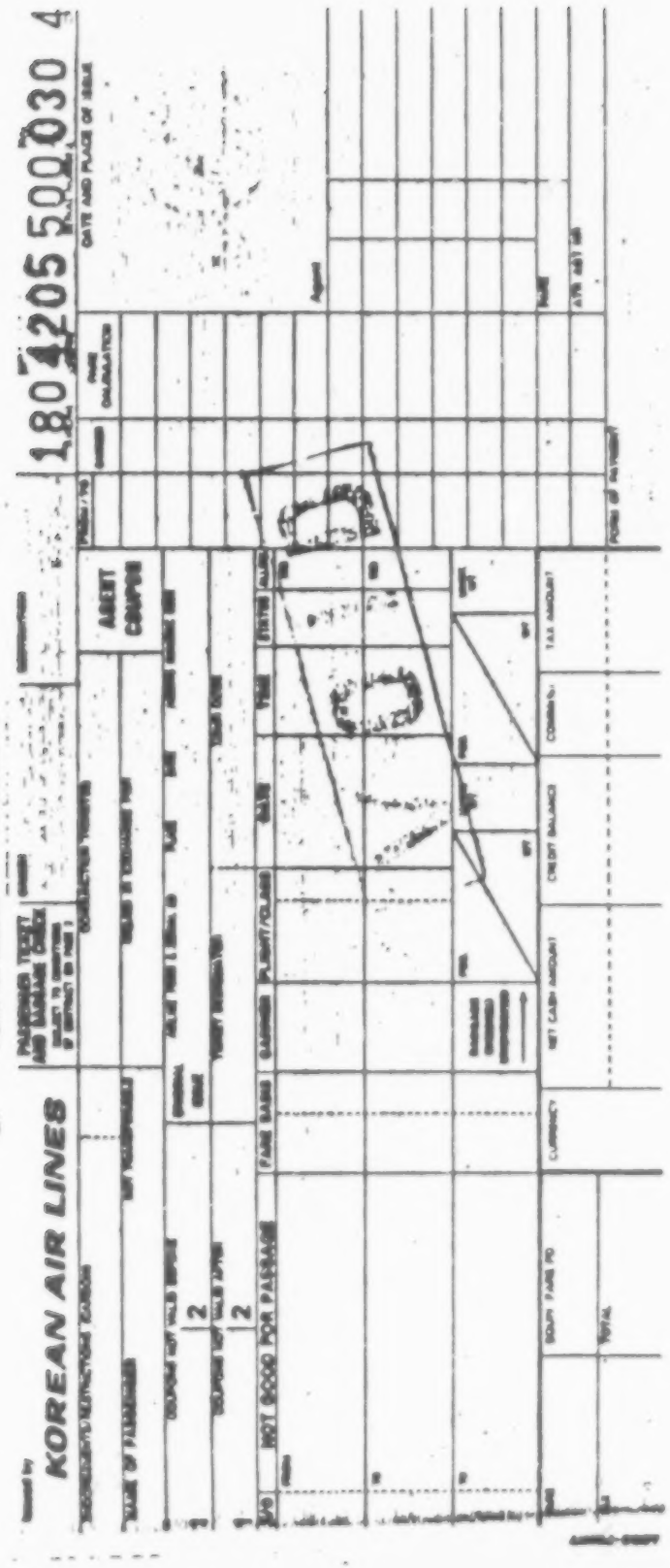
爆発物, 圧縮가스, 引火性物質 多量의 성냥 또는 라이타기름 腐食性, 腐蝕性物質, 放射性物質, 磁気性物質, 旅客에게 不快感을 주는 物質 그리고 航空機, 旅客, 乗務員 및 搭載財産에 損傷을 주기 쉬운 其他 物質, 銃砲, 刀劍 및 其他 類似品目들은 客室内에 持参할 수 없읍니다 仔細한 것은 航空社에 問議하여 주십시요.

搭乘 쿠폰 使用 順序

搭乗用 쿠폰은 旅客用 쿠폰에 記載되어 있는대로 出発地부터 順序에 따라 使用하셔야 합니다.

J.A.105


180 4205 500030 4
AUDIT COUPON
KOREAN AIR LINES
NOT GOOD FOR PASSAGE


180 4205 500030 4
AUDIT COUPON
KOREAN AIR LINES
NOT GOOD FOR PASSAGE

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 3

180 4205 500 030 1

AIRLINE CODE — SERIAL NUMBER — CK

NAME OF PASSENGER — NOT TRANSFERABLE

ISSUED IN EXCHANGE FOR

FLIGHT COUPON 1

COUPONS NOT VALID BEFORE: 1 2

COUPONS NOT VALID AFTER: 1 2

ORIGINAL ISSUE

TICKET DESIGNATOR — VALID STAMP

S/O	FROM / TO	FARE BASIS	CARRIER	FLIGHT/CLASS	DATE	TIME	STATUS	ALLOW
	FROM							
	TO							

BAGGAGE ALLOWANCE — PCS / WGT — PCS / WGT

FARE — EQUIV FARE PD — TAX — TOTAL

ADDITIONAL ENDORSEMENTS / RESTRICTIONS

180 4205500030 1

ISSUING AIRLINE — FARE CALCULATION

DATE AND PLACE OF ISSUE

Agent

FARE — ATR ADT OR

FORM OF PAYMENT

J.A.108

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 3

180 4205 500 030 5

AIRLINE CODE — SERIAL NUMBER — CK

NAME OF PASSENGER — NOT TRANSFERABLE

ISSUED IN EXCHANGE FOR

FLIGHT COUPON 2

COUPONS NOT VALID BEFORE: 1 2

COUPONS NOT VALID AFTER: 1 2

ORIGINAL ISSUE

TICKET DESIGNATOR — VALID STAMP

S/O	FROM / TO	FARE BASIS	CARRIER	FLIGHT/CLASS	DATE	TIME	STATUS	ALLOW
	FROM							
	TO							

BAGGAGE ALLOWANCE — PCS / WGT — PCS / WGT

FARE — EQUIV FARE PD — TAX — TOTAL

ADDITIONAL ENDORSEMENTS / RESTRICTIONS

180 4205500030 5

ISSUING AIRLINE — FARE CALCULATION

DATE AND PLACE OF ISSUE

Agent

FARE — ATR ADT OR

FORM OF PAYMENT

J.A.109

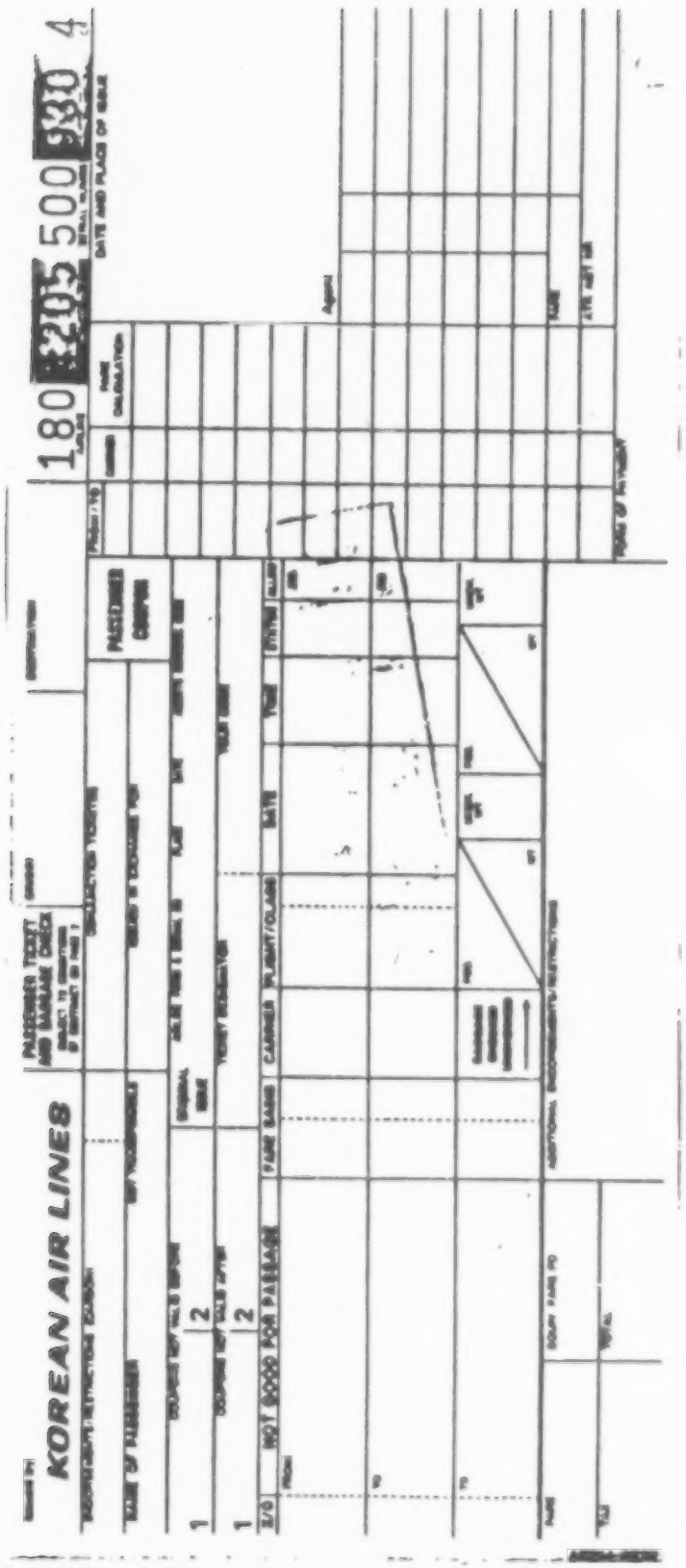


EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345
All Cases

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Judge Aubrey Robinson

Discovery and Inspection of Defendant KOREAN AIR LINES, held at the offices of Condon & Forsyth, Esqs., 1251 Avenue of the Americas, New York, New York, on the 13th day of January, 1983, at 2:10 o'clock p.m., pursuant to Order, before Walter Holden, C.S.R., a Notary Public of the State of New York.

APPEARANCES:

KREINDLER & KREINDLER, ESQS.
Attorneys for Plaintiffs
99 Park Avenue
New York, New York 10016

BY: MILTON G. SINCOFF, ESQ.

—and—

STEVEN J. POUNIAN, ESQ.,
Of Counsel

CONDON & FORSYTH, ESQS.
Attorneys for Defendant Korean Air Lines
1251 Avenue of the Americas
New York, New York 10020
BY: DESMOND T. BARRY, JR., ESQ.,
Of Counsel

MENDES & MOUNT, ESQS.
Attorneys for Defendant Jeppesen
3 Park Avenue
New York, New York 10016
BY: MATTHEW C. FERGUSON, ESQ.
Of Counsel

MR. BARRY: This is the partial production of documents by Defendant Korean Air Lines pursuant to the order of Judge Robinson, which was filed on December 16, 1983, requiring Korean Air Lines to produce the documents it has in its possession relative to the ticketing of the passengers on this flight.

(Whereupon, document above referred to was marked as Exhibit 1000 for identification, as of this date.)

We are going to produce today photographs of the passenger tickets of those passengers who have commenced litigation as well as sample ticket booklets from which the tickets came.

The photographs that we are going to produce are of the auditor's coupons of the tickets because the flight coupons went down with the aircraft.

The first document I would like to mark is Plaintiffs' Steering Committee's first request of Defendant Korean Air Lines for production of documents and things pursuant to FRCP-34.

For the record, counsel for Korean Air Lines will keep the originals of these documents in the document depository at our office in Washington, D.C. and copies will be provided to all counsel for all parties.

Exhibit 1001 is the response of Korean Air Lines to Plaintiffs' Steering Committee's first request for production of documents and things. This is the response that Judge Robinson's order calls to be served and filed today, and I have some courtesy copies.

(Whereupon, document above referred to was marked as Exhibit 1001 for identification, as of this date.)

MR. BARRY: Exhibit 1002.1 through 1002.59 are 58 passenger tickets of those passengers who have commenced suit against Korean Air Lines to date.

Let me describe Exhibit 1002. What I have done is put the caption of the case to which the particular passenger ticket applies, and there is an indication right below the caption of the case as to the ticket booklet from which that particular ticket would have come. I will explain later how to figure that out. Just so that describes what is on here. Some of the actions have more than one ticket, but it's pretty self-explanatory.

I will stipulate that the photographs of these tickets which I am producing, Exhibit 1002, are business records within the Rule 803(6) of the Federal Rules of Evidence.

(Whereupon, document above referred to was marked as Exhibit 1002.1-1002.58 for identification, as of this date.)

Exhibit 1003 is the, for lack of a better description, I will call sample ticket booklet number 1. There are six different ticket booklets from which tickets for passengers on this aircraft came. Exhibit 1003 is a ticket booklet which was printed on May 1, 1980, and tickets with serial numbers 180-4202 100 001 through 180-4203 360 000 and 180-4400 945 001 through 180-4401 470 000.

(Whereupon, document above referred to was marked as Exhibit 1003 for identification, as of this date.)

MR. BARRY: I am also producing as Exhibit 1004 sample ticket booklet number 2, which was printed on May 1, 1981, and this booklet would contain tickets with serial numbers 180-4203 360 001 through 180-4204 260 000 and 180-4401 470 001 through 180-4401 970 000.

(Whereupon, document above referred to was marked as Exhibit 1004 for identification, as of this date.)

MR. BARRY: Exhibit 1005 is sample ticket booklet number 3, which was printed on June 14, 1982, and would contain tickets with serial number 180-4204 260 000 through 180-4205 160 000 and 180-4401 970 001 through 180-4402 570 000.

(Whereupon, document above referred to was marked as Exhibit 1005 for identification, as of this date.)

MR. BARRY: Exhibit 1006 is sample ticket booklet number 4, printed on May 11, 1983, and this booklet would contain ticket numbers 180-4205 160 001 through 180-4205 560 000 and 180-4402 570 001 through 180-4402 720 000.

(Whereupon, document above referred to was marked as Exhibit 1006 for identification, as of this date.)

MR. BARRY: Exhibits 1003, 1004, 1005 and 1006 are Korean Air Lines ticket booklets.

Also, certain passengers on this aircraft traveled pursuant to either ATC tickets or IOTA tickets.

Exhibit 1007 is a sample ATC ticket booklet, and Exhibit 1008 is a sample of an IOTA ticket booklet. I only have an original of each of those, I will provide Xerox copies. Those two originals must stay with me as well as Exhibit 1003, which is the last ticket booklet which Korean Air Lines has of this series in its possession.

(Whereupon, document above referred to was marked as Exhibit 1007 for identification, as of this date.)

(Whereupon, document above referred to was marked as Exhibit 1008 for identification, as of this date.)

MR. BARRY: I will make photographs of the ticket booklets which are Exhibit 1003, 1007, 1008. I will provide Plaintiffs' Committee with originals of Exhibits 1004, 5 and 6.

The documents that I have produced today are in response to Plaintiffs' Steering Committee's request number 9F(7)(a) and request 9F(8) and also (a) and (b).

Mr. Madole had requested that if possible I stipulate that Korean Air Lines' counterpart to the Montreal Agreement CAB 18900 was the standard counterpart filed by foreign airlines to the Montreal Agreement, and I will so stipulate.

MR. SINCOFF: We have asked Mr. Barry to produce a physical copy of the Montreal agreement as a supplement to our formal requests, and he is looking into it and will produce such an agreement when he verifies that it is the agreement signed by Korean Air Lines and in effect on the date of this catastrophe.

MR. BARRY: That is satisfactory. But the stipulation is still there.

In response to Mr. Sincoff's request that I stipulate that the passengers whose names appear on the tickets I produced today were in fact on Korean Air Lines flight 007 when it was shot down by the Soviets over the Sea of Japan on September 1, 1983, I will state that upon the best information and belief of Korean Air Lines at this time, that the passengers whose names appear on these tickets were in fact passengers aboard that flight.

Request 9F(7) and 9F(8) call for, in addition to passenger ticket coupons, invoices, receipts, charge records, reservation records, et cetera, and at present the only documents that I have in response to those requests are the documents which I produced today. If some other documents within the scope of these requests are in the possession of Korean Air Lines, we will produce them.

MR. SINCOFF: Thank you.

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AFFIDAVIT

Gilbert Richman, being duly sworn, deposes and says:

I am the president of Counsel Press, Inc., 30 East 40th Street, New York, New York and have been actively engaged in the printing business for four and one-half years.

A "point" is a unit of measurement commonly used in the printing business to measure the size of printing type.

I have carefully measured the point size of the "Advice to International Passengers on Limitation of Liability" (Advice) contained in the following airline passenger ticket booklets.

I examined ticket booklet "2", the original Korean Air Lines Ticket No. 180-4203-580-043-5, marked as Exhibit 1004. The Advice contained in the booklet is printed in marginally less than 8-point type.

I examined ticket booklet "3", the original Korean Air Lines Ticket No. 180-4402-568-030-0, marked as Exhibit 1005. The Advice contained in the booklet is printed in marginally less than 8-point type.

I examined ticket booklet "4", the original Korean Air Lines Ticket No. 180-4205-500-030-4, marked as Exhibit 1006. The

Advice contained in the booklet is printed in marginally less than 8-point type.

/s/ GILBERT RICHMAN
Gilbert Richman

Sworn to before me this
9th day of February, 1984.

/s/ STEVEN R. POUNIAN
Notary Public

STEVEN R. POUNIAN
Notary Public, State of New York
No. 31-4739952
Qualified in New York County
Commission Expires March 30, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AFFIDAVIT

Michael Minnicino, being duly sworn, deposes and says:

I am the vice president of World Composiiton Services, Inc., 432 Park Avenue South, New York, New York and have been actively engaged in the printing business for five and one-half years.

A "point" is a unit of measurement commonly used in the printing business to measure the size of printing type.

I have carefully measured the point size of the "Advice to International Passengers on Limitation of Liability" (Advice) contained in the following airline passenger ticket booklets.

I examined ticket booklet "2", the original Korean Air Lines Ticket No. 180-4203-580-043-5, marked as Exhibit 1004. The Advice contained in the booklet is printed in 8-point type.

I examined ticket booklet "3", the original Korean Air Lines Ticket No. 180-4402-568-030-0, marked as Exhibit 1005. The Advice contained in the booklet is printed in 8-point type.

I examined ticket booklet "4", the original Korean Air Lines Ticket No. 180-4205-500-030-4, marked as Exhibit 1006. The Advice contained in the booklet is printed in 8-point type.

/s/ MICHAEL MINNICINO
Michael Minnicino

Sworn to before me this
9th day of February, 1984.

/s/ STEVEN R. POUNIAN
Notary Public

STEVEN R. POUNIAN
Notary Public, State of New York
No. 31-4739952
Qualified in New York County
Commission Expires March 30, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3441, 3445, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3901, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

STATEMENT OF GENUINE ISSUES OF KOREAN AIR LINES CO., LTD. PURSUANT TO CIVIL RULE 1-9(h)

Pursuant to Rule 1-9(h) of the Civil Rules of this Court, defendant KOREAN AIR LINES CO., LTD. (hereinafter KAL) submits the following statement of material facts as to which it contends there exist genuine issues necessary to be litigated.

1. Defendant KAL admits the truth of the facts contained in paragraphs 1, 2, 3, 5, 6, 7, 8 and 9 of the Statement of Material Facts submitted by plaintiffs in support of their motions for partial summary judgment.

2. Defendant KAL denies the truth of the material facts contained in paragraphs 4, 10 and 11 of the Statement of Material Facts submitted by plaintiffs in support of their motions for partial summary judgment except that KAL admits that on May 21, 1969 KAL filed its counterpart to CAB Agreement 18900 with the Civil Aeronautics Board of the United States.

3. In accordance with the specifications of the Montreal Agreement, KAL ordered tickets from a printer with the Montreal Advice printed in a type size at least as large as 10 point modern type.

4. Apparently as a result of the printing process, a printing irregularity occurred and the Montreal Advice on some KAL tickets was reproduced in a type size that was not as large as 10 point modern type size.

5. The Montreal Advice on page 4 of KAL sample passenger ticket booklets "2", "3" and "4" was printed in a type size not quite as large as 10 point modern type size.

6. The difference in type size between the Montreal Advice on the tickets issued to plaintiffs' decedents and 10 point modern type size is 2/72 of an inch.

7. The difference in size of the letters of the Montreal Advice in the KAL tickets issued to plaintiffs' decedents and 10 point modern type size cannot be detected by the naked eye of the average layman and is miniscule. It is only after measurement with an appropriate optical device that any difference can be detected.

8. The Montreal Agreement does not specify any sanction against an airline whose tickets do not contain a Montreal Advice printed in at least a 10 point modern type size.

9. KAL delivered a passenger ticket to each of plaintiffs' decedents which contained an Advice to International Passengers on Limitation of Liability in a print size that is easily readable and which notified each of plaintiffs' decedents of the applicability of the Warsaw Convention to their transportation.

10. KAL delivered to each of plaintiffs' decedents a passenger ticket containing adequate notice of the applicability of the Warsaw Convention to the transportation in a timely manner so as to afford each passenger a reasonable opportunity to take self-protective measures against the limitation of liability.

11. Plaintiffs' decedents had reason to know that their overall transportation was international before embarking on their respective journeys.

12. The identity of the proper representatives of the decedents listed in Appendix A and Appendix B and whether they have the proper capacity to bring these actions under applicable law.

Dated: Washington, D.C.
March 21, 1984

Respectfully submitted,

CONDON & FORSYTH

By /s/ GEORGE N. TOMPKINS, JR.
George N. Tompkins, Jr.

Attorneys for Defendant
KOREAN AIR LINES CO., LTD.
1100 15th St., N.W.
Washington, D.C. 20005
(202) 289-0500

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3441, 3445, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3901, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

RULE 56(f) AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GEORGE N. TOMPKINS, JR., being first duly sworn, deposes and says:

1. I am an attorney and counsellor at law and a member of the firm of Condon & Forsyth, attorneys for defendant KOREAN AIR LINES CO., LTD. (hereinafter KAL) in these multidistrict litigation proceedings. I have participated in the defense of this litigation since its inception and I am fully familiar with all the proceedings heretofore had herein.

2. I submit this Affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in opposition to plaintiffs' motions on the grounds that discovery by means of written in-

terrogatories, document requests and depositions addressed to the issue of the amount of compensatory damages allegedly due plaintiffs is necessary before defendant KAL can "present by affidavit facts essential to justify" its opposition to this "branch" of plaintiffs' motions for partial summary judgment. Fed. R. Civ. P. 56(f).

3. In this second "branch" of plaintiffs' motions, the Appendix B plaintiffs and the Belli plaintiffs have moved this Court for an Order directing defendant KAL to promptly pay to the families of each plaintiff listed in Appendix B damages up to the limitation of liability of $75,000 imposed by the Warsaw Convention as supplemented by the Montreal Agreement. In support of the motions, plaintiffs allege that the recoverable compensatory damages in each of these cases exceeds the sum of $75,000 and, therefore, plaintiffs are entitled to immediate partial summary judgment for that amount.

4. Plaintiffs' motions for immediate payment of the $75,000 limitation of liability are premature. KAL is entitled to discovery in order to ascertain the full extent of the evidence plaintiffs intend to present in support of their claims for damages under applicable law and the identity of the proper party plaintiffs. Such discovery could determine that a particular plaintiff is not the proper representative of the decedent, lacks the capacity to sue or, moreover, that certain plaintiffs' damages, under applicable law, are less than the $75,000 limitation of liability.

5. Without the benefit of this damage discovery, KAL is not able at this time to present by affidavit to this Court the essential facts with respect to either the proper amount of recoverable damages or the proper party plaintiff in each case, which facts would serve to justify KAL's opposition to this "branch" of plaintiffs' partial summary judgment motions. For this reason alone, plaintiffs' motions should be denied in their entirety.

6. Therefore, should the Court determine that partial summary judgment for limited damages is not precluded by the applicable law, as urged by KAL in its Statement of Points and Authorities in Opposition, pp. 64-70, KAL requests an opportunity to conduct damage discovery in each of the cases listed in

Appendix B before this Court entertains this "branch" of plaintiffs' motions for partial summary judgment.

7. There are submitted with KAL's Statement of Points and Authorities in Opposition as exhibits true copies of the following documents:

Exhibit	*Title*
A	*II Conference Internationale de Droit Privie Aerien, 4-12 Octobre 1929, Varsovie*, ICAO Doc. No. 7838 (1957)
B	*Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929* (R.C. Horner & F. Legrez trans. 1975)
C	I *International Conference on Private Air Law, The Hague, September, 1955, Volume I Minutes*, ICAO Doc. No. 7686—LC/140 (1956)
D	II *International Conference on Private Air Law, The Hague, September, 1955, Volume II, Documents*, ICAO Doc. No. 7686—LC/140 (1956)
E	Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, September 28, 1955, 478 U.N.T.S. 371
F	U.S. DEP'T OF STATE, PRESS RELEASE No. 268, 50 Dep't State Bull. 923 (1965)
G	U.S. DEP'T OF STATE, PRESS RELEASE No. 110, 54 Dep't State Bull. 955 (1966)
H	U.S. DEP'T OF STATE, PRESS RELEASE No. 111, 54 Dep't State Bull. 955 (1966)
I	CAB Order E-23680, 31 Fed. Reg. 7302 (1966)
J	Reply Brief of Petitioner To The Memorandum For The United States as *Amicus Curiae*, *Alitalia—Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968)

K Memorandum For The Civil Aeronautics Board as *Amicus Curiae, Alitalia—Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968)

L Brief of Canada as *Amicus Curiae, Alitalia—Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968)

M International Air Transport Association (IATA) Resolution 724

N Opinion in *O'Rourke v. Eastern Air Lines, Inc.*, Nos. 83-6065, 83-6071, slip op. 2143-2178 (2d Cir. Mar. 2, 1984)

WHEREFORE, defendant KOREAN AIR LINES CO., LTD. requests this Court to issue an Order denying plaintiffs' motions for partial summary judgment in their entirety and for such other further and different relief as to this Court might seem just and proper.

/s/ GEORGE N. TOMPKINS, JR.
George N. Tompkins, Jr.

Sworn to before me this
21st day of March, 1984

/s/ LAWRENCE MENTZ
Notary Public

LAWRENCE MENTZ
Notary Public, State of New York
No. 31-4513579
Qualified in New York County
Commission Expires March 30, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3441, 3445, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3901, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

AFFIDAVIT OF ABRAHAM L. MEILEN

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ABRAHAM L. MEILEN, being first duly sworn, deposes and says:

1. I am over 21 years of age and employed by Harborview Press, Inc., 480 Canal Street, New York, New York. I have been employed in various capacities in the printing industry since 1931, including 19 years as an officer for a company that was one of the official printers for the United States Court of Appeals for the Second Circuit. I submit this Affidavit based upon my own personal knowledge and if necessary I could testify competently to the facts contained herein.

2. I have carefully examined the original of the following sample ticket booklets of Korean Air Lines Co. Ltd. (KAL):

a. Booklet "2", used for tickets printed on May 1, 1981 with serial numbers 180-4203 360 001 through 180-4204 260 000 and 180-4401 470 001 through 180-4401 970 000;

b. Booklet "3" used for tickets printed on June 14, 1982 with serial numbers 180-4204 260 000 through 180-4205 160 000 and 180-4401 970 001 through 180-4402 570 000; and

c. Booklet "4" used for tickets printed on May 11, 1983 with serial numbers 180-4205 160 001 through 180-4205 560 000 and 180-4402 570 001 through 180-4402 720 000.

3. With respect to each of these sample ticket booklets, the type size of the text of the "Notice" on page 2 is printed in bold letters of 8 point type size and paragraph 2 in the Conditions of Contract on page 2 is printed in bold letters of 6 point type size. On page 4 of each booklet, the text of the "Advice to International Passengers on Limitation of Liability" is printed in bold letters of 8 point type size.

4. Printed matter contains 72 "points" per vertical inch. Thus, one "point" is equivalent to one seventy-second of an inch. The difference in size between 8 point type and 10 point type is, therefore, two seventy-seconds of an inch. This difference, in my opinion, cannot be detected by the naked eye of the average layman and is miniscule. In fact, I used an optical magnifier to measure the type size of the "Advice to International Passengers on Limitation of Liability" on page 4 of the KAL sample ticket booklets "2", "3" and "4".

5. The phrase "10 point modern type" does not necessarily refer to a specific type of a certain size. The term "modern type" is often used in the printing trade in a generic sense to describe a variety of typefaces that were introduced to the printing trade approximately 50 years ago. Even though something is printed in "10 point modern type" it does not mean that an individual letter is 10 "points" in size. Thus, something printed in "10 point modern type" using one typeface style may contain letters varying in size from something printed in "10 point modern type" using a different typeface style. It is improbable that the average layman could determine by looking at the size of an

individual letter whether it is printed in "10 point modern type" or something less or greater in size.

6. The "Advice to International Passengers on Limitation of Liability" on page 4 of the KAL sample ticket booklets was printed and then offset so that it appears to be 8 point type. The process of offsetting reduces the print size somewhat. It is possible, therefore, that the original print of the "Advice to International Passengers on Limitation of Liability" in the KAL tickets was 10 point type but was reduced in size by the offsetting process.

7. The primary difference between 8 point type and 10 point type is that 10 point type of a specific text face is somewhat larger than 8 type of the same text face. As a result, 10 point type contains fewer lines of print per inch than 8 point type, assuming there is no leading between lines.

8. As illustrated by the United States Government Printing Office pamphlet *Specimens of Type Faces* (attached hereto as Exhibit "A"), 10 point type of one text face varies in appearance and readability from 10 point type of another text face. For example, "11 Point No. 21" (Linotype) type has the appearance of 11 point type while "Cheltenham Condensed" (Monotype) type has the appearance of being smaller than 10 point type. Both of these types as shown in the respective paragraphs of Exhibit "A", however, are printed in 10 point type.

9. The "Advice to International Passengers on Limitation of Liability" on page 4 of the KAL ticket booklets "2", "3" and "4" is within the range of size of type faces listed in Exhibit "A" hereto. The "Advice to International Passengers on Limitation of Liability" in the KAL sample ticket booklets "2", "3" and "4" is more readable than some of the 10 point type faces shown in Exhibit "A" and is equally as readable as the majority of the type faces listed therein. It also is readily apparent that the print of the "Advice to International Passengers on Limitation of Liability" in the KAL ticket booklets is larger than some of the samples of 10 point type size shown in Exhibit "A" hereto.

/s/ ABRAHAM L. MEILEN
Abraham L. Meilen

Sworn to before me this
20th day of March, 1984

/s/ CRUZ DUENO
Notary Public

DUENO CRUZ
Notary Public, State of New York
No. 03-4779616
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1985

EXHIBIT A

SPECIMENS OF

type FACES

UNITED STATES GOVERNMENT
PRINTING OFFICE

WASHINGTON-1969

48 DIFFERENT 10 POINT TEXT FACES

Bodoni (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Bookman (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Cheltenham Bold Condensed (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be

Baskerville (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

Caslon Oldstyle (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be con-

Clarendon (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

Baskerville (Fotosetter)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner.

English Caslon (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

11 point No. 21 (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Baskerville Bold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

Century Bold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Garamond (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Bodoni Book (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Century Expanded (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Garamond (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be con-

Bodoni (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

Century Schoolbook (Fotosetter)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Garamond Bold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Bodoni Bold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Cheltenham (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be

Granjon (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be

Bodoni Modern (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in

Cheltenham Condensed (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier weight old-

Goudy Text (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier weight oldstyle and

J.A.132

J.A.133

BEST AVAILABLE COPY

Each block of copy is 2 pt leaded

Scenic (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and

Kennerley (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore

Kennerley Bold (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Times Roman (Linofilm)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Stymie Medium (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner.

Stymie Bold (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and mod-

Alternate Gothic (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier weight old-

Franklin Gothic (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

News Gothic (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

News Gothic Bold (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

News Gothic Condensed (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier weight oldstyle

Sans Serif Medium (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

J.A.134

BEST AVAILABLE COPY

Typewriter (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in

Memphis Light (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner.

Memphis Medium (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner.

Stymie Light (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner

Futura Demibold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Futura Demibold Condensed (Fotosetter)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier

Futura Medium (Fotosetter)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Lightface Gothic (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Sans Serif Bold (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Spartan Book (Linofilm)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Spartan Heavy (Linofilm)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Vogue Bold (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldsty
and modern manner. They may there-

J.A.135

EXHIBIT B

SECOND
INTERNATIONAL CONFERENCE
on
PRIVATE AERONAUTICAL LAW
MINUTES
WARSAW, 1929

Robert C. Horner
Didier Legrez

Fred B. Rothman & Co.

SIXTH SESSION
October 9th, Morning

The session is open at 10 o'clock, Mr. Lutostanski presiding.

THE PRESIDENT: Sirs, the preparatory committee has finished its work.

I ask Mr. Giannini, President of this committee, to acquaint us with the results of this work.

MR. GIANNINI (Italy): Sirs, the preparatory committee examined all the questions of substance number 2, given that the wording is still reserved. The committee ruled on each article. The Reporter will kindly indicate the decisions that it took.

On most of the questions, I may say on the majority of the questions, agreement was reached, but there still remain some questions upon which the conference will have to pass. I will ask the delegates who have reservations to make, to make them on the record; that will permit us to hasten our work, and this is indispensable, because we must now do the drafting, and this is a large task.

I propose that we begin our examination article by article, beginning with the first; as we have examined in our last plenary session questions of substance number 1, we will certainly be in agreement on the substance of each article. For articles for which there are questions which concern the Report of Mr. De Vos, the Reporter will kindly explain the results to which we arrived.

I believe that in this way we can proceed quite rapidly. If the conference could finish this morning an examination of questions of substance number 2, the drafting committee would be able to meet even this afternoon.

THE PRESIDENT: I believe that there is no opposition to adopting the method proposed by Mr. Giannini, and I ask the Reporter to present to us his observations on the first article.

MR. DE VOS, Reporter: Mr. President, Sirs, I believe that we are not quite in agreement on the procedure which was indicated by Mr. Giannini. I think that it would be better to take first of all the articles upon which there are observations of substance. After this morning's session, which could be short, we might refer our decisions to the drafting committee, which

would give us definitive texts, and then all the articles could be examined tomorrow.

If you will permit me, I will limit myself now to presenting general observations made on the present text following amendments of substance which had been retained.

I believe that I must pay tribute, here, to the President of the preparatory committee. The night before last he had promised us to meet this morning; yesterday, the day passed in discussing, in working steadily, relentlessly, enthusiastically, thanks to the spirit with which Mr. Giannini imbued the committee. In the name of all the committee, I thank him quite sincerely! (Applause). It's not personal thanks, as he said yesterday, but the unanimous thanks of all the delegates.

I would still like to address one word of thanks to others besides the President: To all the delegates who have presented amendments and who, after a short exchange of views, hastened to withdraw their amendments; not that they were not justified, but because they deviated from the framework of the Convention, which has been limited to certain rules of unification regarding international air carriage.

You cannot expect me to make too detailed a report; we worked very late yesterday evening and I didn't have the time to reflect upon that which was done. I will try to sum up simply, but accurately, the resolutions to which we arrived.

I would like first of all to make a general observation. Certain amendments which seems to us very justified and very reasonable, and, notably, certain commentaries which supported these amendments were illuminating, precise, and brought us very serious enlightments, but above all for the future work of the CITEJA. Thus, among others, were some of the amendments presented by the Brazilian Delegation. The solution which the preparatory committee believed had to be taken was to ask the general assembly to request that the CITEJA take up the diverse points raised by these amendments. The drafting committee will take upon itself, besides, the task of preparing these requests and presenting them to the general assembly for acceptance.

Here are the principal modifications which were accepted by your preparatory committee. It's up to you to determine if you must follow its point of view.

Article 1: There was a British amendment, which is truly an amendment of wording, which consists in applying the text to the special situation which is found in the British Empire.

You have seen that in paragraph 2, in paragraph 3, and in one other article, we speak "of contracting States". Here is the situation which arises from the point of view of the British Empire.

The Empire, when it signs, commits itself by a signature, that of the chief of State, His Majesty the King of Great Britain; but to commit each State, each State must ratify especially the Convention or the King of England must commit it especially or by special mandate. From the point of view of ratification, there may be several ratifying states, but when there are two States, such as the Union of South Africa and India which have ratified, there are not two separate States from the point of view of the Convention, and the carriage which would take place between these two States is not international carriage.

Therefore, for the application of the Convention, the words "two contracting States" in the British Empire means only one single contracting State from the point of view of the Convention.

The British Delegation suggested a new text to us taking into account this special situation. It proposes the substitution in the first paragraph of the following text:

> Shall be deemed 'international carriage', within the meaning of the present Convention, all carriage in which according to the stipulations of the parties, the point of departure and the point of destination, whether or not there be interruption of carriage or transshipment, are situated either on the territory of two High Contracting Parties, or on the territory of one single High Contracting Party, if a stopover is provided for in a territory under the sovereignty, or the authority of another Power. Carriage between territories under the sovereignty or authority of the

same High Contracting Party shall not be considered as international in the sense of the present Convention.

The second point taken up concerns Article 2. It is more important.

MR. GIANNINI (Italy): There is still something else for Article 1; there are still two questions. There is a Japanese proposal and a Brazilian proposal.

The Brazilian proposal is thus conceived:

> Given that the status of the air carrier deviates, by the very international character of the aircraft, from rules relating to the captain in the merchant fleet, to the boatman in river navigation, to the conductor in land communication, this designation should be able to assimulate the multiple concepts on his liability.
>
> This is even more necessary: That the word 'carrier', so adequate with a view towards its final purpose, nevertheless, does not correspond exactly to most of the definitions given to it by the laws of the different countries. It is employed neither by the French texts in the majority of international conventions, nor by the draft concerning liability for damages to third parties, presented in May by Mr. Ambrosini, which looks only towards the owner and the user of the aircraft.
>
> If one wants the carrier to be the air carriage contractor or its operator, within the meaning of economic control of the aircraft set forth by German, Swiss, Hungarian, Dutch, etc., case law, or, to be he on whose account the aircraft is used, according to Danish law;
>
> If one wants to include in the Convention the concept of joint liability provided by Polish law, Article 71, between the owner and the carrier, or that of Brazilian law between the pilot and the ship owner;
>
> If one wishes to bring the English concept of leasing closer to the general formula, in air carriage, characterized by the period of contract, a concept existing in the laws of several North American states . . . one could attain this goal in qualifying the carrier equally with carriage.
>
> I would propose to this effect, but for better wording:

> 'Shall be deemed a carrier he who, owner, charterer, or operator of the aircraft, uses it individually or jointly in the carriage of persons and goods, within the meaning of the present Convention, and in conformity with national regulations'.

As regards the proposal of Brazil, the committee deemed that this problem was not within the scope of this Convention. Given that, in this article, we have made declarations, definitions for practical reasons, that is to say, that the codification of private air law happens progressively, we are obliged to anticipate somehow, we have envisaged certain problems which touch other Conventions. But, as in this case it was not necessary to define the carrier, we have thanked our colleague from Brazil, who made a great effort, and we have referred his proposal to the CITEJA to take under consideration. Thus, there is no decision to take.

We have, moreover, at Article 1, a proposal from the Japanese Delegation upon which it does not insist.

There remains, then, the point of which the Reporter spoke and upon which the conference must pass.

THE PRESIDENT: I believe that it is necessary to refer the article to the drafting committee which will give us a definitive text.

No one opposes? . . . It is so decided.

MR. DE VOS, Reporter: At Article 2, we have a British proposal which consists in reserving to the Government of the United Kingdom, the liberty of not applying the Convention when it concerns carriage performed by the State. This reservation is very serious. Whenever carriage, done by the State for whatever purpose is involved, by no matter what organ of the Government which can invoke the prerogatives of the Crown, the Convention will not apply.

Our committee considered that this question should be examined by the plenary conference.

Mr. Giannini, President of the Committee has the floor.

MR. GIANNINI (Italy): Sirs, the question which was presented by the British Delegation—I must draw the attention of the conference to this point—is connected to the problem of

merchant fleets dealt with in the Brussels Convention in which the British Empire dealt also with the question of State vessels. We are in the same situation, given that there is a quite special request, quite particular, from England, which is explained in the note which you find at Article 2 of the draft.

The British reservation has great importance in practice: for the moment, it has none, given that there are no air carriers belonging to the State, but there remains nonetheless, the possibility that this hypothesis may occur.

Moreover, the Delegation from the USSR presented a formula which says the same thing: "The Government of the USSR states that it reserves the application of the Convention to aircraft which are under the direct control of the State".

I must say that in the Italian Delegation we are in a very difficult state of mind: Our hope was that after the agreement was reached for merchant ships, the question would not have been raised in this conference. Given that it was raised, we find ourselves in the situation where we were before the Brussels Convention for maritime law. The same reserve was expressly demanded by the British Government, but if one provides for this reserve for Great Britain, each State will have the right to do the same thing.

I don't say that we must insert in the Convention an article such as that which was proposed by the Delegation from the USSR; but I believe that one must insert an article to give the liberty to States to be able, them also, when they want, to declare that the Convention does not apply to State aircraft, that is to say, a general clause which will confer upon States the right of arranging their particular situation according to their wishes, if by chance, tomorrow, circumstances render it necessary.

MR. SABANIN (USSR): Two words only: In the case of non-acceptance of the stipulation in the sense of the British reservation, I am ready to withdraw my amendment.

SIR ALFRED DENNIS (Great Britain): This reservation applies only to the English State and, at the last minute, to the Union of South Africa and Australia, because I have only recently received my full powers from these Governments. But if the other States wish to make the same reservation, I will make no objection.

The difficulty is that I have formal instructions to make this reservation, and I was not able to have new communications from my Government. If my Government wishes to withdraw this reservation, I will withdraw it immediately.

I cannot help but remark that it is quite a pity that this reservation, one that I have made right from the first sessions of the CITEJA, and one that I have renewed during three years, raised no objection, and that today, for the first time, some are presented. If it had been otherwise, I would have been able to consult my Government and perhaps to receive broader instructions; but I have formal instructions. My colleagues will understand that I find myself at an impasse and I can do nothing. I am obliged, whatever it costs me, to tolerate this situation.

MR. RIPERT (France): It is quite true, that right from the first sessions the British Government has always indicated to us that it would ask for a reservation for carriage performed by the State; but I do believe that most of us had understood that it would be a question of carriage performed by the State in the public interest, an interest of the State, and not merely commercial carriage. The tendency of all States is, in effect, at the present time, to treat commercial enterprises created by the State as enterprises created by individuals.

Mr. Giannini responded that in Brussels a convention was done in this sense. Under the form which is presently presented, the reservation of the British Government tends to checkmate the Convention everytime the carriage is performed by an aircraft belonging to the State. I understand well that in the spirit of my colleagues the reservation is quite theoretical for the moment, because there is no country where such carriage is performed under these conditions at the present time. But, nothing says that tomorrow States will not do this carriage themselves, and it would be inadmissable that in a Convention where all States must be on equal footing, England not be under the Convention when all the other States would be.

I profoundly regret this proposal because that is going to permit all States who themselves organize commercial carriage to escape from the rules of the Convention, but I see that it is necessary to declare that if the British reservation is maintained, we will ask that it be extended in a general way to all the other

States, and we ourselves will make a declaration saying that the French Government reserves the right not to apply the Convention to carriage performed by a State-owned company.

MR. DE VOS, Reporter: Mr. Ripert has just said very well that which I would probably have poorly explained, notably as regards the misunderstanding which seems to exist between the British Delegation and the other delegates.

If we adopt the reservation proposed by the British Government—even with a majority vote or with near unanimity, we will not be able to oppose a reservation made to the Convention when it is a condition "sine qua non" to its acceptance—I fear indeed that we perform a task which will not be a progressive one. The British Delegation, for some years, insists upon having admitted this principle, and the Maritime Convention had, on the contrary, accepted the principle which we wish to make dominant here, that is to say, to consider all commercial carriage by the State as ordinary carriage, and not to create for them a special situation in commercial exploitation, in the universal commercial community.

I understand perfectly the situation of the British Delegation which is always cooperative, but I ask that one restrict as much as possible the application of this reservation, that one not extend under a general form the reservation proposed by the British Delegation, and which concerns only countries for whom it has an express mandate to act thus.

I add that the Spanish Delegation asks to make a reservation as regards the application of the Convention to State aircraft destined for public service, to military service. This is indeed the sense that we had attached to the reservation presented to the CITEJA and which is in conformity with the reservation made in maritime law.

SIR ALFRED DENNIS (Great Britain): We did not have the intention of applying it to others.

MR. RICHTER (Germany): I didn't understand well the amendment from the Delegation of the USSR. Is it a question of aircraft which are directly under the control of the State?

MR. BABINSKI (Poland): It would perhaps be possible for the British Delegation not to make this reservation at this time; that is to say that one will be able to insert a general article on

the possibility of making reservations in the sense that it was indicated here. The British Delegation will make no reservation at this time, given that it will have the opportunity to make it later on, so that if, after having consulted its Government, it arrives at the conclusion that one could, even for England, not make this reservation, or make it in a very restricted way, it would disappear from the Convention. Under these conditions, the example will not be followed, whereas if the reservation is made here, I fear very much that it will be followed.

MR. GIANNINI (Italy): Mr. Babinski has made a proposal which corresponds to mine. My proposal is that the High Contracting Parties could declare at the moment of ratification that they except from the application of the Convention State aircraft, except for wording of course. I have declared that, in the meantime, England's ratification would let us know if it maintained its reservation or not, and that the other states would then see if they should ratify with or without reservation. If there is no reservation, we won't add any, but if there is a reservation, we will not be able to show a more liberal spirit than our neighbors.

SIR ALFRED DENNIS (Great Britain): I accept this proposal.

MR. SABANIN (USSR): I accept as well.

MR. PITTARD (Switzerland): It would be in the protocol and not in the Convention.

THE PRESIDENT: Sirs, I put to a vote Mr. Giannini's proposal which you have just heard, it being understood that the drafting committee will put the formula in final form.

(Adopted).

MR. DE VOS, Reporter: Sirs, the third article relates to the passenger ticket and to the particulars which must be found on the passenger ticket.

There has been first of all a Polish proposal consisting in providing for two copies of the passenger ticket.

The committee has considered that it was useless in the face of present practice to provide for two copies. These words, besides, could have led to an erroneous interpretation and lead one to believe that two separate papers were necessary, when actually it is simply one booklet with stubs.

A second proposal concerned letter (c).

The Hungarian, British and German Delegations suggested the elimination of the second part of the sentence, that is to say: "as well as the contemplated stopping places".

These Delegations have observed, following the air carriers, that in practice it was very difficult to give the indication of the route to be followed, even in a summary fashion, given that the first carrier has no knowledge of the second and the third for the whole of the contract of carriage.

Next, following certain necessities of the operation of the routes, it is necessary that the route to be followed be modifiable.

What is important for the application of the international convention is to maintain the contemplated stopping places through common agreement, and your committee has deemed that it could retain the amendment suggested by a certain number of delegations.

The letter (c) would thus say simply: "the contemplated stopping places".

The British Delegation, moreover, had proposed adding a particular, providing that the contemplated stopping places could be modified in the case of necessity:

> (c.) Indication of contemplated stopping places.
>
> It may be stipulated that the carrier shall be authorized to modify the stopping places mentioned in case of necessity, but the carriage shall conserve its international character, if it is defined as such by the passenger ticket.

It has been understood that this particular would appear in the text of the Convention after modification by the drafting committee. The meaning of this addition is that the case of "force majeure" must include necessity.

The letter (d) indicates: "the name and the address of the carrier or carriers".

Certain delegations have proposed eliminating "or carriers" and limiting the text to the following wording: "the name and address of the carrier".

In reality, if one had accepted this modification, the liability action in favor of passengers would have become impossible. The committee therefore maintained the present text.

The German Delegation and the Czechoslovakia Delegation have proposed adding the indication for the price of carriage.

The Polish and Brazilian Delegations have asked the addition of the indication of the name and address of the traveler. The Brazilian Delegation added the traveler's nationality. Here is what the Brazilian Delegation said:

> The Havana Convention requires, in Article 9, a list of names of passengers with their addresses and nationalities.
>
> The laws of several European States and international conventions set forth as well the necessity of this boarding document.
>
> The Swiss decree of January 27, 1920 includes it among the eight necessary documents; Latvian law of 1926, Article 22 letter (d), requires it as well, as well as the Chilean decree of 1925, Article 13, the Norwegian law of 1923, Article 41, the Brazilian law of 1925, Article 75, etc. . . . The bill approved for discussion by the French Senate in 1923 says in Article 48: 'A list of embarking passengers shall be prepared, of which the duplicate shall be found on board the aircraft, and be communicated upon their request to the authorities in charge of the transit police'.

The Franco-Spanish Convention of 1928 requires a list of names of travelers, Article 8; in the same way the Polish-Austrian Convention of 1925, Article 14; the German-Czechoslovak Convention, Article 10, etc.

Thus, I would propose adding after letter (d) of Article 3: "(e) the name, address and nationality of the travelers".

These proposals were rejected, not that they will not or would not appear on the passengers ticket—in fact, these headings are found thereon. But in the face of an observation of the Greek Delegate, which is as follows—The last paragraph of the article provides for sanctions in the case of the absence of this passenger ticket, or when the passenger ticket does not contain all the particulars indicated, consequently the sanction is too severe when it's a question of a simple omission, of the negligence of an employee of the carrier—the committee allied to this point of view and, in the last paragraph, it eliminated the words: ". . . or if the ticket does not contain the particulars indicated above".

But the consequence was that it was necessary to be much more severe for particulars imposed on the passenger ticket, and we have retained only the indispensable minimum to be able to consider the carriage as international carriage in the meaning of the Convention. It was added that in practice the delegates were satisfied, and that all the carriers wrote down the particulars which they wanted to see appear on the ticket.

MR. GIANNINI (Italy): I ask the Reporter to give us the article such as it is now prepared now.

MR. DE VOS, Reporter: It's the same text as the draft; there is only the elimination at letter (c) of the summary indication of the route to be followed and the addition of the British amendment, after wording; at the last paragraph, elimination of "or if the ticket does not contain the particulars indicated above".

MR. BABINSKI (Poland): Sirs, I would like to support the amendment which was presented by the Polish Delegation. We voted at the preparatory committee, and it was only by a small majority that this amendment was rejected.

In the spirit of conciliation, we don't want to discuss again the first amendment which concerned the obligation of writing out the ticket in two copies. It would perhaps be difficult for the air carriers to change the established way of writing passenger tickets on a counterfoil book in order to conform to another usage which was set up, for example, in sleeping cars, in making out each ticket in duplicate.

Our second amendment asks that there be placed on the ticket the name and address of the traveler. It seems to us that these indications present an interest and utility.

In effect, if one considers the thing not only from the point of view of the travelers but even from that of the carrier, it is perhaps not without interest for the latter to know exactly who the passengers are that he is going to carry, and even their nationality. During the trip, it may be interesting to know with whom one is dealing. And then there is a question presented: That of knowing whether or not the passenger ticket can be transferred. We don't want to impose non-transferability here; but we want to reserve to the carrier the possibility of demanding that the ticket be in someone's name, with the result of its being non-transferable.

Always in the spirit of conciliation, we have prepared a new wording of our amendment. We don't want a particular to be added at letter (e) or (f) as being compulsory. One would be content in inserting in a paragraph (4) a particular providing that on the demand of either the carrier or the traveler, the ticket will be able to be in a person's name and to bear the name and address of the traveler.

It goes without saying that with the sense of this new paragraph and with the drafting which I propose, the omission of this notice would not lead to any santion.

MR. RIPERT (France): I wish to support the amendment of the Polish Delegation. If the indication of the name of the traveler on the ticket were an obligatory notice, this could have some disadvantages, this would be a useless complication. But in its amendment, the Polish Delegation asks simply that the carrier or the traveler be able, one or the other, to demand that the name of the traveler be inserted on the ticket. This can be very important both for the carrier and for the traveler.

The carrier who concludes the contract of carriage with a particular person can have an interest in not seeing another person substituted for this person. Questions of nationality or the morality of the traveler can have some importance for the air carrier, and the carrier can have an interest in demanding that the ticket not be transferable.

Moreover, the traveler can have an interest in not having the ticket be for the bearer, a bearer ticket which can be stolen, but to bear his name and address to serve as proof if needed.

Since the notice would be inserted if one or the other of the parties asks for it, I believe that there would be no disadvantage in accepting the amendment. We would have provided thereby for the legal question which arises: The question of knowing if the ticket is transferable or not. If there is no name, the ticket is transferable; if one or the other party has required notice of the name, it becomes non-transferable.

We thus have a legal solution through this very simple amendment.

MR. RICHTER (Germany): I cannot see the utility of the right of the traveler to ask for a ticket in his name. If the carrier is not disposed to give a ticket in his name, he will always have the liberty of applying Article 31: "Nothing in the present Convention

can prevent a carrier from refusing to conclude a contract of carriage".

I believe, therefore, that this right which we wish to confer on the traveler is not an absolute right. It depends on the good will of the carrier.

MR. DE VOS, Reporter: The Reporter has always the obligation of opposing the adoption of new texts and, in order not to depart from this good habit, I can but support Mr. Richter's words.

The text proposed has no utility. One understands the intention of the Polish Delegation, which believes that the traveler will have a further guarantee in being able to demand that his name be placed on the ticket; but, it was said, it is an illusory guarantee, because if the traveler has his ticket in his pocket, from the point of view of his representative, in the case of accident, there is no guarantee of identity or of documents establishing his status. It must be noted that in practice quite often air carriers write down the name of the traveler. Finally, we don't know in what measure this carriage will multiply: We can find ourselves in the situation of maritime carriage, of rail, even of bus carriage, nowhere in which is the same thing required.

Moreover, one must not forget that by virtue of internal regulations, lists of passengers exist with the air carriers, where one can find bits of information.

From the carriers point of view, I see no utility either; as Mr. Richter said, if the carrier does not want to carry under certain conditions, he is perfectly free by virtue of Article 31, to refuse the contract of carriage.

MR. RIPERT (France): Will you permit me to ask you, Mr. Reporter, if, according to the text of the Convention, the ticket is transferable or not?

MR. DE VOS, Reporter: It is the contract concluded between the parties which will say so. So, too, if the air carrier wishes to carry only known persons, he will say so.

MR. PITTARD (Switzerland): I would like to ask a question.

We have, as regards carriage, a very simple rule. When one takes a railway ticket it is of no concern to the company to know who it carries, and the person who has taken the ticket is not necessarily he who is carried. But the rules is that once the trip has begun, the ticket is non-transferable; there cannot be

several persons benefiting from the same ticket. And as regards carriage by railway, with combined tickets you have this rule which is an indication: It is requested that it be in someone's name, so that it cannot be transferred from one person to another, to prevent private enterprises from recruiting people who would benefit from a very low tariff, because they would resell to them this split-up passage. For one trip, you have a ticket which does not bear the name of the traveler, and for round trips you have the ticket which bears the name of the traveler. This is the principle for railways.

In air matters, I ask the question: When I go to register to assure myself a place in the aircraft, my name is taken; the ticket is written out in my name. Must I appear personally, or may I take a ticket for a third person without giving the name, which can be the case where an employee says simply, "I am reserving a seat for the X company. . ."?

There is great importance in determining this point. You must first of all ask the question: The ticket, is it transferable or not? For me I would say: It is transferable before the trip, but it is not during it.

MR. DE VOS, Reporter: Why?

MR. PITTARD (Switzerland): We must give the public rules which it understands. If you say: It is a question between the air navigation companies and the public, from the administrative point of view, it's very simple, but all lawyers will say to you, "We must enlighten the public, it must not be obliged to go find air carriers to ask them, 'How do you proceed?' " The public is not going to go find the air carrier to ask him, "Give me your general conditions, so that I can see if I am protected!"

It doesn't cost anything to add a line if it is to avoid a misunderstanding. I am disposed to accept the text which provides for transferability or non-transferability of the ticket. For me, it should be transferable before the commencement of the carriage and non-transferable during the course of carriage. All the same, it is necessary that if I want to take a ticket, if I send my associate, I can be replaced. At Geneva the ticket becomes nominative when one boards the plane. It's at this moment that one writes the name on the ticket. There are, therefore, several systems, but in any case one must take one of them.

MR. GIANNINI (Italy): I believe that it is well and good to see what is presently done in practice.

In practice, presently, at least as regards the Italian companies, air carriers have the ticket signed. Moreover one must consider that, for States which are under the regime of the Paris Convention, the companies have the duty of demanding the names of the passengers because they must prepare the list of persons who depart. When a traveler gets on board, he must give his name and the carrier has the duty to demand his name from him. It's a fact of public law.

In practice, in private law, one has the ticket signed. Now here it's a question of providing for the problem.

In committee, we passed on this formula: The traveler can demand the entering of his name and his address on the ticket; the formula was rejected. But I must say that in practice that is of no importance, and I can accept one decision or the other. Fundamentally, given that the companies have the duty to demand the names of the passengers, and given that there is the duty for passengers to give their name, I believe that if we insert the rule requested by the Polish Delegation, there will be no difficulty, and we will unite public and private law; but, practically, I say that the question has no importance.

MR. PITTARD (Switzerland): Excuse me! Not everybody belongs to the CINA.

MR. RIPERT (France): A simple remark: I take it from what has been said that in practice the ticket must be signed.

MR. DE VOS, Reporter: That's an error: The register is signed.

MR. RIPERT (France): There are countries where the ticket is signed; that would become impossible with the Convention, since the name of the traveler is not mentioned.

MR. AMBROSINI (Italy): I would like to add a word. Is it necessary to include in the Convention all possible entries? I think that it is better to provide mere indications and allow practice to develop a little. We are presented with a means of transportation which has just been born; one must allow practice to develop.

MR. PITTARD (Switzerland): Yes, but there is the question of transferability.

MR. DE VOS, Reporter: You do not eliminate it with the Polish Delegation's proposal.

MR. PITTARD (Switzerland): I simply ask the question.

THE PRESIDENT: No one demands the floor on this question?

We are therefore going to pass to a vote on the proposal of the Polish Delegation, addition of the following paragraph:

> Upon the demand of either the carrier or the traveler, the passenger ticket shall be able to be nominative and to indicate the address of the traveler.

A vote by States is asked.

The polls are open.

(Result of vote: FOR—10 votes, AGAINST—12 votes. STATES VOTING FOR: Spain, Finland, France, Greece, Italy, Luxembourg, Netherlands, Poland, Czechoslovakia, Yugoslavia. STATES VOTING AGAINST: Germany, Austria, Belgium, China, Denmark, Egypt, Great Britain, Union of South Africa, Australia, Hungary, Mexico, USSR. ABSTENTIONS: Japan, Switzerland.)

(The proposal is rejected.)

THE PRESIDENT: We pass to Article 4; the Reporter has the floor.

MR. DE VOS, Reporter: The observations presented on Article 4 can be summed up in the three following connections: What are the particulars to be inserted on the baggage check; what are the compulsory particulars; then, the principle of sanction in case of the non-existence of the ticket or of mistake in the particulars to be put on the baggage check.

The committee was in agreement to eliminate the letter (c): "Summary indication of the route to be followed", for the same reasons as those which were presented to you awhile ago, as well as the following: "As well as contemplated stopping places", provided that the baggage check bears the number of the passenger ticket and that the passenger ticket contains the indications in question.

The letter (c) falls, therefore, and the numbering must be, consequently, modified.

The committee eliminated letter (f): "Indication that the ticket is prepared in two copies", considering that this notice is useless.

In contrast, the committee was in agreement in accepting proposals for new particulars which are as follows:

Under letter (f) indication of the number and weight of the parcels.

Under letter (g), indication of the value of the shipment; that is to say, the particular which appears in Article 8, letter (m), "the sum representing the value of the shipment declared conforming to Article 23, paragraph 2".

The committee has deemed that it was preferable to put under letter (h) the following article which imposes the obligation of putting on the ticket a clause stipulating that the carriage is governed by the system of liability set forth by the present Convention.

On the subject of compulsory particulars, the committee decided to reduce these compulsory particulars to a strict minimum, and we have recognized letters (d), (f) and (h) as compulsory. This relates to the third paragraph relative to the sanction for omission of particulars on the check. The last paragraph was not modified like Article 3; that is to say that we have retained the same sanctions in the case of errors in the particulars, however only letters (d), (f) and (h) are now compulsory particulars.

MR. MOTONO (Japan): I would like simply to make one observation that I made in committee.

It is said in the article that delivery is validly made to the bearer of the check.

This validity does not exclude liability in the case of "dol" or of "faute lourde". I believe that this is the interpretation of the conference and that this should be made evident at the time of final wording.

MR. DE VOS, Reporter: That's correct, Mr. Delegate. I thank you for having reminded us of it.

THE PRESIDENT: No one asks the floor on this question? . . .

I put to a vote the proposals of the committee.

(Adopted).

THE PRESIDENT: We pass to the subsequent articles. The Reporter has the floor.

MR. DE VOS, Reporter: On Article 5 there is no observation to be made.

On Article 6 there is a first observation of the German Delegation, which is for the purpose of specifying the values of the copies of the waybill: "Each of these three copies shall have the same value".

So that there be no doubt, we have eliminated the second: "these three copies shall be of the same value". We have added at the first paragraph: ". . . by the consignor in three original copies".

At the third paragraph certain delegations had proposed adding, after the words "signed by the consignor", the words: "or his agent", in considering that we have the words "and the carrier", followed by the words "or their agents".

Other delegations had proposed, on the contrary, eliminating: "or their agents".

We are in agreement on substance: This question concerns the agency relationship, and in order that there be no possible erroneous interpretation, we have eliminated everywhere the word "agent". The words "consignor" and "carrier" cover the person himself and any persons who can act in his name by virtue of any kind of agency relationship.

THE PRESIDENT: There is no opposition. The proposal is adopted.

MR. DE VOS, Reporter: On the same Article 6, there was a proposal of the British Delegation drawn up under the form of a new article, but which, in reality, comes within the framework of Article 6. This proposal, which consisted in establishing a presumption of signature for the account of the consignor, was drawn up thus:

> The signature of the consignor may be affixed by the carrier, acting on behalf of the principal, provided that said carrier has the required authority to do so.

This proposal was withdrawn.

There is another proposal which consisted in adopting Article 39 of the Bern Convention. The committee was in agreement to ally itself with this proposal.

THE PRESIDENT: No one asks the floor on these proposals of the committee? . . .

They are adopted.

MR. DE VOS, Reporter: At Article 7, we have no observations.

For Article 8, the same observations were presented as for Article 3 and 4 as regards the particulars which must appear on the document of carriage.

The letter (c) was modified like Article 3, that is to say that one eliminated: "The summary indication of the route to be followed as well as . . .".

After "the contemplated stopping places", it will be necessary to make an addition to provide for the possibility of modifying these stops.

The particulars "the name and address of the carrier or carriers" was changed and we say: "the name and the address of the first carrier". The reason existing in Article 3 to retain the words "or carriers" does not exist here, considering that recourse for goods is different from recourse for travelers.

At letter (f), certain delegations asked that the question of the waybill drawn to order be expressly examined. As it has been said and repeated several times, the question of the waybill drawn to order has not been examined in a special way by the CITEJA. It's a problem which remains open and which will be considered again as soon as practical experience unfolds.

The words at the end of this passage "if necessary" will be retained in order to indicate that nothing prevents the existence of the order contract.

At letter (g), the last part of the sentence was eliminated, and there remains only the indication of the nature of the goods, which is sufficient for the application of the Convention.

At letter (i) we had a British proposal which consisted in adding "the apparent condition of the goods".

This proposal was accepted. Besides, a non-mandatory particular is involved. At letter (l), following a request from the German Delegation, the text was modified: "If the shipment is made for payment on delivery, the price of goods and, possibly, the amount of the charges".

So that no one mistake the fact that the price of goods and the amount of charges will appear in the text only if the shipment is made for payment upon delivery.

As regards compulsory particulars, there is a modification, as you will see, in replacing letter (g) by letter (i). In the last sentence of the article we have limited the number of compulsory particulars, the other particulars becoming optional.

MR. PITTARD (Switzerland): I regret insisting upon retaining an indication of the route to be followed. Here it's no longer a question of passengers, but of goods which, confided to the carrier, will circulate without surveillance to the destination.

You're not unaware of the fact that there are, as regards goods, customs of carriage in different countries, and it makes some difference to me if I send goods from one country to another to know that they are going to cross such and such country where they can be seized. It can happen this way for certain pharmaceutical products, for saccharin, absinthe, opium. To indicate the route to be followed, that does not mean that one will indicate exactly the air route which will be followed, but the consignor must be able to say, "I don't want to go through this country", and the carrier must be obliged to submit to this prohibition.

We have already seen this regarding railroads; we haven't seen much of it yet regarding air carriage, but I am rather a specialist in carriage matters and I know of cases where goods sent in good faith from Italy to Holland, with the notice, "via Switzerland", have been diverted by France, because there was a convention between the federal railroad and the Companie de L'est (French railroad company), a convention of which no one was aware.

It concerned Michelin tires made in Tourin, and as the law prohibited entry of French goods carrying a French brand when they are not made in France, the tires were seized against the will of the consignor, who had put, "via Switzerland".

If I want to send saccharin to England, I can send it via Belgium or via France and Holland; I know where I may go through. But if the carrier has the goods pass through wherever he pleases, he risks having great damages to pay.

I see no inconvenience in putting "route to be followed", because we always say, as regards air law: One can delay departure, one can modify the contemplated stopping places, but it must be taken into account that besides the carrier there are

consignors who have particular interests, for customs reasons, in passing or not passing by such and such country; I insist in specifying a point which is simply a point of wording: the article must begin by not saying "the waybill contain" but by saying "the waybill must contain". It must be the same for the passenger ticket.

MR. DE VOS, Reporter: This last remark is a simple question of wording. It seems evident to me that one must take the same wording everywhere, and to put everywhere, in all the Articles, "contained", considering that there are optional particulars and that consequently one cannot put "must contain".

As regards the proposal of the Swiss Delegation, I would like to ask our colleague not to insist, considering that we have studied the affair in depth and that in reality we yielded to the objections of practical order raised by the air carriers. All the guarantees which we need can be found in the words "the contemplated stopping places". Provided that there is no stop in any country overflown, there is nothing to be feared from the authorities of this country.

MR. PITTARD (Switzerland): And if there is an involuntary stop, "force majeure" cannot be argued. You have flown above the country where you did not want to fly; you sometimes have several lines which do not pass by the same areas and you indicate that which you choose. You do so for letters and you don't want to do it for goods?

MR. DE VOS, Reporter: Nothing prevents the two parties from making special contracts. If one of these parties has an interest in providing against overflying such a country, he can have it put expressly in the contract.

MR. PITTARD (Switzerland): I ask that it be provided for here.

MR. DE VOS, Reporter: It's possible, but why put it in the Convention?

MR. PITTARD (Switzerland): All air waybills bear, for railroads, "route to be followed", and if you put nothing, the railroad must take the most economical route, but it's provided for. If you provide no particular, it's because it is of no concern to you, but the particular is provided for. Here, this indication is not compulsory, since it appears under letter (c). Then, why

set up a special regime for aircraft, where forbidden countries are overflown or where one risks being obliged to land, when in rail carriage, where the route is known, where a specific route is followed, it has been admitted? It's all the more reason to admit it concerning air routes which are not visable.

I insist in order that this indication appear as optional if you want; if you don't place it in the Convention, the carrier can refuse it to you, whereas if it appears in the Convention, the carrier will not be able to refuse it.

MR. DE VOS, Reporter: In practice, the carriers always indicate the route to be followed and it's in their interest; when they carry and when they go into a country they have great interest in saying to the passenger that he will pass through such and such country when they know it, but they cannot always know it. It's simply an optional notice. You are partly satisfied because that exists in practice.

MR. PRESIDENT: Sirs, if no one asks the floor on this question, we are going to vote on the Swiss proposal which consists in retaining an indication of the route to be followed.

The Swiss Delegation proposes retaining the initial text of letter (c): "summary indication of the route to be followed (via) as well as the contemplated stopping places".

MR. GIANNINI (Italy): "Summary indication of the route to be followed (via) as well as the contemplated stopping places, which can be modified, except in the case of an express provision in the contract."

Except for definitive wording, of course.

THE PRESIDENT: I put this proposal to a vote.

(Adopted).

THE PRESIDENT: The Reporter has the floor.

MR. DE VOS, Reporter: I think I have not understood well. Yesterday, during discussions in committee, I never understood that the particulars indicated at the last sentence were modified and it is absolutely impossible that it be otherwise. If I made an observation to Mr. Pittard, it's because I had maintained my text: The compulsory particulars are those which appear under letters (a) to (e). You cannot say that letters (a) to (e) are compulsory, because we have retained as compulsory the particulars

which allow determining if the carriage is international; how can you determine it if the point of departure and the point of destination are removed?

MR. RICHTER (Germany): I support the Reporter's proposal.

MR. DE VOS, Reporter: It's a question of wording. It is necessary to maintain in the last sentence of Article 8: "the particulars indicated under letters (a) to (i)", and then the vote on the Swiss particulars takes on another meaning, and I am sure that Mr. Pittard is in agreement in recognizing that the indication "route to be followed" must disappear from letter (c) and be placed under a new letter.

MR. PITTARD (Switzerland): I agree.

MR. RIPERT (France): From the point of view of drafting, I believe that the last paragraph of Article 8 must disappear completely.

The article begins by saying: "The air waybill must contain the following particulars". It ends: "the particulars indicated under letters . . . must be compulsorily inserted in the air waybill". In reality all of them are not compulsory, but the same sanction does not apply to all of them: The Convention sets forth what must be placed on the waybill. Now, there is a special text on sanctions. Consequently, this last paragraph serves no purpose, if not to provoke the carrier to non-compliance. I will ask therefore, that we eliminate the last paragraph of Article 8 which can be found precisely in another article, Article 17 of the Convention, which says:

> If, for international carriage, the carrier accepts goods without having drawn up an air waybill, or if the air waybill does not contain all the indications given by Article 8 (a) to (g) inclusive, and by Article 9, the contract of carriage shall nevertheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability of that derived from the faults of his servants.

MR. DE VOS, Reporter: I see no disadvantage in accepting the French proposal, all the more since Article 17 provides sanc-

tions for the non-inclusion of compulsory particulars with reference to Article 8.

MR. CLARKE (Great Britain): I believe that there was a proposal to put Article 17 in line with Articles 3 and 8.

THE PRESIDENT: We refer, then, to the drafting committee, but I perceive that Article 8 is accepted.

The Reporter has the floor.

MR. DE VOS, Reporter: On Article 9 there is no observation but this article will perhaps change its place, and will become Article 8.

At Article 10, there was an observation from the Swedish Delegation, not drawn up, which consisted in bringing up again that the sanction was too severe. It was not retained.

THE PRESIDENT: No one demands the floor? . . .

Article 10 is adopted.

MR. DE VOS, Reporter: At Article 11, no observation.

Article 12, there was a proposal from the Polish Delegation tending to specify the case in which the exercises of the right to dispose of the goods is no longer in effect. The amendment was the following:

> The carrier can neither refuse to carry out the orders of the consignor nor delay or change the performance thereof, except in the following cases:
>
> (a) the performance is no longer possible at the time when these arrangements become known to the carrier, or,
>
> (b) the performance is of such a nature as to interfere with the regular service of the operation.
>
> In this case the consignor shall be advised as soon as possible of the obstacles which present themselves to the performance of his orders: The carrier shall have the right to collect the charges which arise from the performance of the orders above-captioned.

The intention of the Polish Delegation was to avoid errors in interpretation of the text and to propose a more precise text.

It seemed to us that this intention for precision did not exist in the opinion of most of the members, and that the sentence: This right can be exercised . . . "inasmuch as the exercise of this right brings no prejudice either to the carrier or to other

consignors, and with the obligation to reimburse the resulting charges" is clearer than the two cases proposed by the Polish Delegation. The sentence "of such a nature as to interfere with the regular service of the operation", is too vague and it could not be retained.

We have, however, retained from the Polish proposal the idea that it will be necessary to advise the consignor as soon as possible of the non-performance of his orders.

There is still a British proposal to specify the meaning of the words "to all interested parties", which is found in the second paragraph.

This proposal can be found at page 4 of the observations of the British Delegation: omission of the words, "to all interested parties", and their replacement by the sentence, "to any person making claims against or through the intermediary of the carrier, by virtue of a transfer or of a legal act the date of which is subsequent to that of the air waybill".

The words, "to all interested parties", were criticized as being too vague and of such a nature as to constitute a pretext for claims raised by the consignee or his subsequent buyers.

There was at the same time a French proposal asking replacement of the words, "to all interested parties", by "the consignee". Almost the same proposal from the Japanese Delegation.

We came to agreement on a text which will be submitted to the drafting committee and which specifies who the interested parties are, who will have the right to act.

MR. MOTONO (Japan): We have specified in the first paragraph of Article 12: the carrier. The carrier must be in possession of an air waybill in order to give the necessary indication.

MR. GIANNINI (Italy): I would like to specify the meaning of the amendment.

The Japanese Delegation asked that the interpretation which it proposed be entered in the minutes.

The delegation proposes adding after the word, "consignor", the following words: "possessor of a waybill". This does not create the obligation of always preparing a waybill, but only makes it necessary for disposition en route.

We are of the opinion to include it, and we think that the Japanese Delegation will thus be satisfied.

THE PRESIDENT: No one asks the floor on this article? . . .

Article 12 is adopted.

The Reporter has the floor.

MR. DE VOS, Reporter: On Article 13 we have no observations.

For Article 14 we had an exchange of views on the subject of the respective rights of the consignor and the consignee. There was, in effect, a proposal from Hungary, from Romania, and from France to replace the word "and" by the word "or". It was decided, for the moment, to maintain the present text, even if we see, in the drafting committee, that it is necessary to modify it. The two interested parties, the consignor and the consignee, can assert their rights which are their own and act one or the other for the account of one or the other, according to their interests.

THE PRESIDENT: There is no observation? . . . The article is adopted.

MR. DE VOS, Reporter: Article 15 gave rise to no observation.

Article 17 is referred to the drafting committee; we replaced letter (g) by letter (i).

At Article 18 we have a proposal from Brazil relating to the retention of documents of carriage for two years. This proposal is thus conceived:

> I will propose as well that the following paragraph be added in connection with the disposition of Article 28 on the period of limitation of the liability action, taken from Article 12 *in fine* of the Italian decree of August 20, 1923:
>
> 'These notices shall be retained by the carrier for two years after the last registration and transcription'.

The committee deemed that this rather concerned the first committee of the CITEJA, and we have asked that this proposal be referred to this committee.

THE PRESIDENT: There is no opposition? . . . Adopted.

MR. DE VOS, Reporter: We come to Article 19. It's a question here of the different models of air carriage documents.

Since practice can change in its details, the Hungarian Delegation had suggested leaving to some organ the task of modifying the models. We could have accepted that, but following an exchange of views, it was found to be more expedient to eliminate this article completely, considering that it contained no obligation, and to present, under the form of a request, the desire to see the formulae drawn up by a special organism designated by the intermediary of the French Government.

MR. GIANNINI (Italy): The proposal is the following: Instead of inserting as annexes to the Convention, the models which will not be part of the Convention, we came to agreement not to eliminate the article, but to make a request in which we recommend adopting the models which were prepared; next, we requested the CITEJA to review periodically these models which we recommend. That is to say that these models will not be part of the Convention, but are recommendations. The request will be formulated, if the conference is in agreement with us to adopt it.

MR. PITTARD (Switzerland): I believe that no one can doubt my attachment to the CITEJA, but we have instructions from our Government not to mention any other organ in the Convention, nor in a request. I will therefore be obliged to abstain. Our Honorable Secretary General knows the interest which I have in the CITEJA, but my Government does not want any other organ to be mentioned. I have very clear instructions, and I warn you against the adoption of a request to which I could not ally myself. Let us not speak therefore, of the CITEJA, which the States ignore, but let's put "to the most appropriate organ"; it's obviously the CITEJA.

MR. RIPERT (France): I admit that I don't understand this systematic disregard of the CITEJA on the part of States which belong to it and which contribute to its maintenance.

There is a Convention, and then models. These models are not compulsory for anyone. The air carriers are free to adopt documents of carriage at their pleasure. If the conference makes a request, it can be only this one: "That the air carriers adopt a uniform model".

What objection can the Honorable Swiss Delegate have, if, instead of leaving to the disposition of the air carriers the choice

of models, we recommend, not to the governments—it is the carriers who intervene—the documents of carriage which will have the approval of the CITEJA? That does not link the Swiss Government to anything, anymore than the French Government. This request is addressed to carriers who, according to the Convention, are completely free and of whom we ask renunciation of a part of their liberty. We could just as well recommend the models of the IATA. If we prefer the CITEJA, it's because it seems to us more independent of particular interests. There is only a request which is concerned with particular interests.

I believe that Mr. Pittard can see no disadvantage in accepting this request.

MR. GIANNINI (Italy): I made the proposal myself as a compromise after a long discussion in committee, and it was approved unanimously. I would like us to have unanimity here as well.

MR. RIPERT (France): We will formulate the request in a manner which specifies our way of thinking.

MR. PITTARD (Switzerland): I make no opposition, I specify a point of view.

THE PRESIDENT: I put to a vote the proposals of the committee amended by the request of Mr. Pittard, except for wording.

(Adopted).

The Reporter has the floor.

MR. DE VOS, Reporter: We pass to Article 20.

The period of carriage commences beginning from the time of embarkation of the passenger on board the aircraft; for goods it's the same formula as that which is presently found in the text: From the moment they enter the aerodome of departure to the moment where they leave the aerodrome of destination, with specifications for the case of forced landing proposed by the British Delegation.

It was asked as well that each State define the limits of an aerodrome but the committee did not think it ought to enter upon this road which went beyond the framework of the present Convention.

There is no observation on this Article? . . .

(Adopted).

MR. DE VOS, Reporter: For Article 21 we have had no substantive observation.

MR. SCHONFELD (Netherlands): It is said in this article that the carrier is liable for all damage sustained during carriage notably in the case of death or injury. But in the two cases the death must occur during carriage?

MR. DE VOS, Reporter: We are in agreement on substance: It is necessary that the death or injury occur during carriage.

MR. SCHONFELD (Netherlands): But if the death occurs one or two days after the end of carriage, it's considered as being sustained during the carriage and I believe, that, in this case, the situation is the same as in the case where the death is sustained during the carriage itself?

MR. DE VOS, Reporter: We have a British proposal on this subject which asks for the omission of the words, "during carriage", in the first line of the text, and for the addition at the end of each of the clauses (a), (b), and (c) the words, "during the air carriage". This proposal seems to us, however, too absolute, but the wording could be modified.

MR. SCHONFELD (Netherlands): You say that the carrier is liable in the case of death or injury: "sustained during carriage". You mean that the death must occur during the carriage?

MR. DE VOS, Reporter: Not necessarily, but if we adopted the English wording, will your observation fall?

MR. SCHONFELD (Netherlands): No, I say that the case where death occurs during carriage is the same as if death occurs some days after the end of carriage.

MR. DE VOS, Reporter: We are quite in accord, and it's for this reason I say that the English proposal goes too far in asking that there be added simply "during air carriage". The accident can occur during the carriage and the death happen afterwards.

MR. AMBROSINI (Italy): I propose eliminating the words "occurred during carriage". The carrier is liable for damage in the case of death or accident, even if the period of carriage has already ended.

MR. DE VOS, Reporter: We are in agreement on substance. It's a question of wording.

MR. RIPERT (France): Couldn't one ask to change the order of the paragraphs, to end the article by the definition of carriage?

MR. DE VOS, Reporter: It's a question which we will consider in drafting committee.

THE PRESIDENT: No one makes any objection? The article is adopted.

MR. DE VOS, Reporter: At Article 22 there is a British proposal which consists in adding a third paragraph thus conceived:

> The liability set forth by Article 21 shall be set aside if the carrier proves that, notwithstanding his own fault or that of his servants, the person injured could have avoided the damage in taking reasonable measures to this effect.

The committee, as regards substance, accepted the idea of it: The drafting committee will put the text into shape.

MR. MOTONO (Japan): I regret having to ask for explanations, but my Government requested me to ask for them on this Article 22 and on the exact meaning of the first paragraph.

Does the paragraph cover, for example, errors of piloting?

MR. GIANNINI (Italy): Given that we still have the drafting committee and that the Delegate from Japan belongs to it, he will see if the wording is clear, and if he finds that there are still some doubts, we will talk it over.

MR. MOTONO (Japan): I have a mandate to ask specifications from the conference.

THE PRESIDENT: We will read the draft a third time in plenary conference.

MR. MOTONO (Japan): Yes, but I am obliged to obtain explanations before hand.

MR. DE VOS, Reporter: Now that we have eliminated the last part of the first paragraph of Article 22, it indeed seems that the drafting committee will have to reread the complete text.

There is a presumption of fault on the part of the carrier. The carrier is exonerated from liability in proving that he has taken

all the reasonable measures or that it was impossible for him to take these measures.

MR. MOTONO (Japan): For travelers and goods?

MR. DE VOS, Reporter: For the two of them; it's the principle.

MR. MOTONO (Japan): That covers errors of piloting?

MR. DE VOS, Reporter: With the reservation of Article 2 which says:

> In carriage of goods and baggage, the carrier shall not be liable for errors of piloting, of flying of the aircraft, or of navigation if he proves that he himself took the reasonable measures to avoid the damage.

There is here a nuance which we must clarify.

MR. MOTONO (Japan): There is double meaning.

MR. DE VOS, Reporter: No, not necessarily. There are reasonable measures which the carrier can take and there are measures which the pilot can take.

MR. MOTONO (Japan): What do you mean by "reasonable measures"?

MR. DE VOS, Reporter: This expression, which has a more precise meaning in Great Britain than on the continent, will be interpreted by the judge according to the case.

MR. MOTONO (Japan): Do you mean to say that the fact of hiring a capable pilot suffices?

MR. DE VOS, Reporter: It's a question of interpretation. The drafting committee will perhaps be able to specify the meaning of this expression.

MR. MOTONO (Japan): I would be of the opinion that it should be clarified. I thank you.

THE PRESIDENT: No one asks the floor? . . . The article is adopted, except for wording.

The Reporter has the floor.

MR. DE VOS, Reporter: We have discussed the economic side of Article 23, and there is a modification which we have decided to bring to our text, following the French proposal. It is necessary to put at paragraph 3: 5,000 francs, even if the definition for the gold franc must be reexamined in the drafting committee.

THE PRESIDENT: There is no opposition. (Adopted).

MR. DE VOS, Reporter: Articles 24 and 25 gave rise to no observation.

At Article 26 the Czechoslovak Delegation observed to us, with much sense, that we had provided only for the use of one line by one company and not carriage by a private person. It is necessary therefore to modify the text slightly at the second and third lines to provide for the domicile of the carrier.

At the second paragraph, there was a Japanese proposal and a British proposal to eliminate this provision, and the committee allied itself with this point of view after a long exchange of views.

There was a British proposal consisting in adding a paragraph to say that the courts had the right not to act when certain provisions could be contrary to rules of law of the country. The British Delegation did not insist.

We have eliminated the last part of the sentence: "no particular formality or security can be demanded".

The British Delegation had asked that one apply this provision in taking nationality and not residence as a criterion; it was decided not to enter into questions of procedure, but rather to eliminate this addition.

MR. RICHTER (Germany): I ask to make a proposal that I am obliged to submit to you. As it is very simple, I will perhaps be able to present it to you.

Article 26 provides the courts before which the liability action may be instituted and leaves the right to choose these courts. We are of the opinion that it would be good to specify that this right to choose the courts will be able to be exercised one time only. If the plaintiff has instituted an action before a court, and if he withdraws it, one cannot give him the right to act before another court.

Our proposal would tend to say, according to the Bern Convention: "Suit having been instituted, the right of choice is extinguished" . . . (Article 42 of the Bern Convention, Section 2, third paragraph).

MR. DE VOS, Reporter: I see no disadvantage in accepting the German proposal.

THE PRESIDENT: There is no opposition? The article with the German amendment is accepted.

MR. WOLTERBEEK-MULLER (Netherlands): Was a security bond eliminated?

MR. DE VOS, Reporter: Yes, for questions of procedure.

MR. WOLTERBEEK-MULLER (Netherlands): The injured person may decide not to choose his own court: Why has this elimination been made?

MR. AMBROSINI (Italy): The Italian Delegation must make a reservation. Since we put aside questions of procedure, all of them must be eliminated. In any case, in the drafting committee we shall see.

MR. PRESIDENT: This is another question. Mr. Wolterbeek-Muller asks the reasons for the elimination of a part of the last paragraph: "However, no particular formality or security bond can be demanded from the plaintiff, etc . . .".

MR. GIANNINI (Italy): The question was raised in committee. The problem was presented thus:

The British Delegation observed that, according to English law, the security bond is asked not only of a foreigner who has no domicile in England, but also of an Englishman who has no domicile in England. One asked therefore, a security bond even from an Englishman who has no domicile in England. Then, to cover all these hypotheticals, one should say: "by reason of his nationality or his domicile".

But the committee wondered, if, in a Convention which must provide only for the air question, it was necessary to insert a rule which is one of general order, and it thought that it was better to leave aside all problems of general order.

This rule would be very useful, but it would be isolated in a system of procedure, because, in all the other questions, we accept the principle of nationality.

THE PRESIDENT: You don't insist? . . . No one asks the floor?

The article is adopted. We pass to the following article.

MR. DE VOS, Reporter: At Article 27, we have no observation.

MR. SCHONFELD (Netherlands): I must support the observation which was presented by the Romanian Delegate:

> The Romanian Delegate believes it more equitable not to put on the same ground the case of non-apparent damages and that of mere delay which can be resolved at the time of the taking into custody of the goods. The Romanian Delegate proposes therefore the elimination of the words 'or of delay'.

What reason is there to put the case of non-apparent damage on the same footing as that of delay? When my trunk arrives on time, I am asked if I accept it. I see the trunk, there is no apparent damage, I accept it. My trunk arrives one day or two days later; it is presented to me, I accept it. For what reason has the case of non-apparent damage been put on the same footing as that of delay?

MR. DE VOS, Reporter: We made the day before yesterday, a discrimination between the two situations and we have adopted different periods for damage and delay. We will take account of your observation. We saw the day before yesterday, that, in effect, it was not the same situation and that it was necessary to make a difference.

MR. SCHONFELD (Netherlands): The two situations have no relation to each other.

MR. DE VOS, Reporter: Yes, but the drafting committee is going to separate the two things.

MR. SCHONFELD (Netherlands): Yes, but the case of delay does not give the right to demand indemnification if there is no damage for the simple reason that there is a delay. But if one puts the two cases together, apparent damage and non-apparent damage with delay, I no longer understand.

MR. DE VOS, Reporter: This article does not provide for liability in the case of delay; it merely provides the period in which it is necessary to protest. Liability is fixed by Articles 21 and following.

THE PRESIDENT: Does someone still ask the floor on this article? . . .

No one asking the floor further, the article is adopted.

We continue.

MR. DE VOS, Reporter: At Article 28 the committee retained the proposal of the Italian Delegation which considers that the *lex fori* makes the legal situation of the carrier too uncertain.

The Italian Delegation proposes therefore to eliminate the paragraph:

> The method of calculating the period of limitation, as well as the causes of suspension and of interruption of the period of limitation, shall be determined by the law of the court having jurisdiction.

And to replace it by: "The liability action must be instituted under pain of forfeiture, within a period of two years".

MR. GIANNINI (Italy): This was already done in plenary session.

MR. DE VOS, Reporter: Yes, but in eliminating the second paragraph we were going too far, and, upon the proposal of the French Delegate, we decided that it was better to maintain the decision by virtue of which the law of the court having jurisdiction, dealt with in Article 2, determines the moment when the action begins.

MR. RIPERT (France): It is evident that one determines at the same time the periods of interruption and of limitation. We are in agreement in substance.

THE PRESIDENT: There is no opposition.

The article is adopted.

MR. AMBROSINI (Italy): The Convention does not provide for the case of non-execution of the contract of carriage. The conference will have to provide for it. It is necessary to know if one must apply the Convention or not, that is to say, the system to which the case of non-execution will have to be submitted.

MR. DE VOS, Reporter: It's the national law which governs this case.

MR. GIANNINI (Italy): That is to say that in the case of total non-execution, the Convention does not apply.

MR. RIPERT (France): What does "total non-execution" mean? The case where a contract of carriage, having been concluded, the goods are not delivered, or the carrier has refused them? I agree. But, total non-execution of carriage, that corresponds to the case of goods lost.

It's not the words "total non-execution" that one must find, it's another expression.

MR. AMBROSINI (Italy): The other cases are provided for in the Convention. Goods are delivered to the aerodrome and the carrier refuses to ship them.

MR. RIPERT (France): Then, you want to provide for the case where the carriage, by mistake, does not occur. Then, it's national law which intervenes.

MR. AMBROSINI (Italy): It should be so said. This can be referred to the drafting committee.

MR. YOUPIS (Greece): I excuse myself for returning to a question which has already been discussed, but I was not fully conscious of the objection of the Delegate from the Netherlands as regards the security bond provided for by Article 26: "No particular clause or security bond can be required from the plaintiff . . .".

I find it to be a very important clause.

Suppose a passenger who takes an aircraft to go from one country to another is injured. He is obliged to have recourse in a court of another country; in this case, he will post a security bond. I believe that in this case it would be fair to exempt him from this security bond, which would be probably quite high to prevent him from having recourse to a foreign court. There has been no vote, I believe, on this question; I ask if one could not vote.

It was objected that according to English law it's not nationality which comes into play but domicile: One can include both and the formula can cover all cases, as much from the point of view of Continental law as from the point of view of British law.

I ask if it is possible to vote on this question.

THE PRESIDENT: I believe that the question was discussed.

MR. YOUPIS (Greece): You are right from the point of view of form, but as I find that this question is very important, I ask that if it is not possible to reconsider the decision. If the majority is against my proposal, I will yield, but I believe that one should vote, because I think that several delegations are of my opinion.

MR. GIANNINI (Italy): In a few words, here is the situation. The problem has no interest for States signatory to the Hague Convention. In the last Hague Convention, we made great effort to broaden the procedural convention. A broadly open protocol was prepared which will allow many States to belong.

Therefore, for States belonging to the Convention, the question has no importance; for States which will be able to sign the Convention, it has no importance either. There are also the bilateral conventions. Finally, there is a question of methodology: One can, in a particular convention, treat problems like this one?

We have decided that we would put in our Convention only matters strictly necessary for a convention on private aeronautical law. For what reason should we make a particular rule here for the security bond?

If one wants to present all the problems, so be it; but why provide for the question of the security bond and not the others?

I believe that it is necessary to decide whether or not this question must be treated, and I ask you to put it to a vote or at least to put the question on the record.

MR. SABANIN (USSR): Since the question is broached, I ask that one proceed to a vote, and I indicate to Mr. Giannini that in the Bern Convention the question is treated in Article 45.

MR. GIANNINI (Italy): There is also the question of judgments.

MR. MOTONO (Japan): I must say that for us, who have not ratified the Hague Convention, the question is quite important.

SIR ALFRED DENNIS (Great Britain): If I understand this proposal well, we would not have the right to impose conditions on the plaintiff? This would be quite contrary to our procedure and we could not accept it.

We have always followed in this Convention the principle that questions of procedure would be left to national courts, and it is difficult to impose a special law in a convention of general order.

MR. RICHTER (Germany): My Government deems that an international regulation of the question of the security bond is not acceptable, if this rule does not bear upon all nations. Consequently, one should provide for or prohibit the security bond, not only for plaintiffs of a foreign nation, but also for the case where the plaintiff would have his domicile in another country. The second question that one should provide for is that the judgment which dismisses the plaintiff be enforceable in all other countries for the court costs; but as it seems impossible to obtain a majority for any rule whatsoever, we have asked to vote in the elimination of the paragraph in question.

MR. PITTARD (Switzerland): This is exactly what I was going to say. If one admits Mr. Youpis' principle, I ask the insertion of the exequator for the execution of judgments in foreign countries, as it is said in the Bern Convention.

Either the Bern procedure or nothing at all.

MR. RIPERT (France): It seems indeed that there is therein a question which cannot be resolved by a simple majority. If all the delegates could accept this provision, it would be preferable, but since everyone doesn't have the mandate to accept it, it is better to let it fall. There are points for which one can yield before a majority, but there, if we have no unanimity, we will have nothing.

MR. GIANNINI (Italy): I would like to draw the attention of the conference to the importance of the decision which we are going to take.

One should not compromise the success of the Convention for this question. We all know, because we worked at the Hague, with what difficulty we were able to reach an agreement which still requires much effort to be accepted.

We are here to make an effort in favor of air navigation; we must do everything possible in order not to compromise the agreement. I will content myself with having a convention of aeronautical law, and I implore the conference not to insist on this point, because, as Mr. Ripert said, one cannot adopt these solutions by a simple majority. If I had the impression that we could come to unanimity, I would say to you: Yes; but I have the contrary conviction.

I implore the conference to limit itself to a convention of private aeronautical law.

THE PRESIDENT: No one asks the floor further? . . .

We are going to pass to a vote. The vote by States is asked.

The Assembly is consulted on the point of knowing if it intends to retain the decision reached previously: Elimination of the last sentence of the last paragraph of Article 26 relating to the security bond.

The vote is open.

(Result of vote: FOR THE ELIMINATION of the sentence—21 votes, FOR THE RETENTION—3 votes. STATES VOTING FOR RETENTION: Greece, Netherlands, USSR.)

THE PRESIDENT: I ask the Reporter to resume his expose at the place to which we had arrived.

MR. DE VOS, Reporter: We were at Article 29: it raised no observation.

For Article 30 we had a proposal from the Japanese Delegation which provided for the option of derogating from the rules of competence, and which was thus conceived:

> The Japanese Delegation deems that it is necessary to recognize the validity of a prior agreement between parties as regards competence, and proposes therefore, to eliminate the last part of the first sentence beginning with: 'or by a modification of the rules of competence'.

The committee deemed that it could not follow the Japanese Delegation in this proposal; but the Japanese Delegate asked that the question be discussed in plenary session.

I would indeed like him to defend this question himself.

MR. MOTONO (Japan): The Japanese Government considers that this freedom accorded to the parties is a principle of law, and it's in this spirit that we ask modification of this article, and we implore you to put it to a vote.

It's a question of deciding on the retention or the elimination of the words "or by a modification of the rules of competence".

One could add a clause indicating, at the last line of the article: ". . . courts other than the courts provided for by the Convention".

MR. RIPERT (France): In order that the Japanese Government be enlightened on the debates of this conference, it is not useless to point out that the absolute freedom of choice of a

competent court leads in fact to the suppression of the Convention. It would be enough that there be a clause granting jurisdiction to a court of a non-contracting country so that this country not have to apply the Convention, and not only could the carrier bring the plaintiff before any court which would please him, but also he could fix the court of a non-adhering country and thus take himself out of the provisions of the Convention.

We hope that the Japanese Government will not insist when it becomes familiar with the provisions of the Convention.

THE PRESIDENT: No one asks the floor? . . .

We are going to pass to a vote.

(The Japanese proposal is rejected.)

THE PRESIDENT: Mr. Reporter, please continue.

MR. DE VOS, Reporter: In Article 31 there are simply certain conditions concerning additional articles which were proposed by certain delegations. There is no observation.

THE PRESIDENT: No one asks the floor? . . .

The Article is adopted.

MR. DE VOS, Reporter: We have an article proposed by the Czechoslovak Delegation as an additional article:

> In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply.

I want to remark that this was provided for: Provided that the case which arises was not provided for in the Convention, it's the common law which is applicable.

I believe therefore, that this provision would be of no use.

MR. GIANNINI (Italy): It was withdrawn.

MR. DE VOS, Reporter: There were two proposals, one from the Czechoslovak Delegation which consisted in applying national law for cases not provided for by the Convention, and then a proposal of the Yugoslav Delegation which concerned the application of the Bern Convention for cases not provided for by the Convention.

MR. GIANNINI (Italy): Following a suggestion made by the German Delegation we are going to propose adopting for the

Convention: "Convention relating to certain rules for the unification of private aeronautical law".

Given that the title indicates the special character of the Convention, the Czechoslovak Delegation no longer insists on its amendment. As to the proposal of applying secondarily the rules of the Bern Convention, it was withdrawn.

THE PRESIDENT: Consequently, the proposals are withdrawn.

MR. DE VOS, Reporter: There is only the wording proposal, concerning the wording of the title.

MR. AMBROSINI (Italy): Then, for the special case that I have brought up, it's the drafting committee which will deal with it as well.

MR. RIPERT (France): There is an additional article proposed by the French Delegation on exceptional carriage which was accepted.

MR. GIANNINI (Italy): There is as well a British proposal to specify that working days and not "consecutive" days are involved here. We are in agreement in substance; it's a question of wording.

There is another proposal from the Delegation from the USSR upon which I draw your attention:

It concerns knowing if we consider that the signature will be final at the moment of the signature of the protocol, or if we want to leave the Convention open.

The Delegation from the USSR proposes leaving the protocol open during a certain period of time to all States who were not represented at the conference.

MR. SABANIN (USSR): No, only to participating States.

MR. GIANNINI (Italy): We must make this clear: for States represented here?

MR. SABANIN (USSR): For States represented here only.

MR. GIANNINI (Italy): I ask the conference if we are in agreement on this point.

MR. BABINSKI (Poland): I see no objection in substance to the proposal of the Delegation from the USSR, that is to say, that one put beside the adherents, the signatory States, but I would like to reserve this question for the drafting committee, for reasons of the technical side of the thing, because the proposal of the Delegation from the USSR will necessitate the reworking of the preamble.

MR. GIANNINI (Italy): There is another question. The problem has been raised of knowing if it is necessary to set forth the option of revising the Convention on the demand of some States, or if it's necessary to provide for periodic revision at fixed dates.

The committee, in accord with colleagues who made the proposals in this sense, proposes to the conference not to provide for periodic revision at fixed terms.

First of all, we don't know when this first Convention will enter into force. Next, the revisions which are necessary in certain cases in conventions of private law, are not recommendable, because they lead to modifications, sometimes without result. The CITEJA already gives us a lot of work, and States which are not presently at the CITEJA could ask to revise the work done.

The committee therefore decided to accept the formula presented by the Polish Delegation:

> Each State which is party to the Convention shall have the option of convening a new international conference for the purpose of seeking improvements which could be brought to the present Convention. It shall address itself for this purpose to the French Government, which will take the necessary measures in order to prepare this meeting.

THE PRESIDENT: Does anyone have any observation to present on this proposal? . . .

It is adopted.

MR. PITTARD (Switzerland): Why not leave the Convention open? All those who are here can sign, but I don't see the possibility of making a closed Convention.

MR. SABANIN (USSR): It will be open.

MR. PITTARD (Switzerland): It will be open to those who are not represented here?

THE PRESIDENT: We are in agreement.

MR. BABINSKI (Poland): The Convention will first of all remain open up to a certain date in order to permit States repre-

sented here to sign even later on, then all the States can adhere to the Convention.

THE PRESIDENT: Sirs, we have finished our work as regards the second step: examination of definitions proposed by the preparatory committee. I am happy to ascertain that we are almost at the end of our work, because I am persuaded that the work of the drafting committee will go very quickly.

I propose to you to convene the plenary conference tomorrow afternoon, because I don't believe that the drafting committee can finish its work sooner than that.

I ask Mr. Giannini's opinion.

MR. GIANNINI (Italy): I would like very much to make every effort to hasten the end, but the preparatory committee has worked so hard that we all are a little tired.

I believe that everyone is in agreement to thank our Reporter one more time, because he has done an enormous work.

Under these conditions, I believe that we can finish our work for tomorrow afternoon, but for the plenary session, I propose postponing it to Friday morning.

MR. BABINSKI (Poland): We are approaching the end of the week; we should give the text for printing Friday morning, otherwise we will come to Saturday afternoon where no one works at the print shop. That will delay things. I propose therefore to put off the plenary session to tomorrow afternoon.

MR. DE VOS, Reporter: I am all the more happy with the proposal of Mr. Babinski since I cannot stay beyond Thursday night.

I believe that the best solution is to have a plenary session tomorrow afternoon. Otherwise it is quite probable that we will not have the text before Monday.

THE PRESIDENT: There is no opposition to the proposal of Mr. Babinski? . . .

It is thus decided.

The session is closed.

(The session is closed at 1:15 p.m.)

Secretaries General:
LEBINSKI
E. SUDRE

The President:
LUTOSTANSKI

PRELIMINARY DRAFT OF THE CONVENTION

relating to documents of air carriage and
the liability of the carrier in
international carriage by aircraft,

adopted by the CITEJA
during its Third Session in May, 1928.

CHAPTER I
Object—Definitions

Article 1

The present Convention shall apply to international carriage of passengers, goods and baggage performed by aircraft for remuneration or by an air carrier with or without remuneration.

For the purposes of this Convention, the expression "international carriage" shall mean all carriage in which, according to the stipulations of the parties, the point of departure and the point of destination, whether or not there be a break in the carriage or transshipment, are situated either within two Contracting States, or within a same Contracting State if a stop is provided for in another State, even though it not be a Contracting State.

Carriage envisaged as a single operation under the form of a single contract or a series of contracts to be performed by several successive air carriers shall be deemed, for the purposes of this Convention, to be a single carriage, and shall not lose its international character by the fact that a single contract or a series of contracts is to be performed entirely within the same State.

In the case of combined carriage performed in part by air and in part by any other mode of carriage, the stipulations of the Convention shall apply only to those portions of carriage to be performed by air if the latter fulfill the conditions of paragraph 2.

Article 2

The Convention shall apply to carriage performed by the State or by the other legal entities of public law under the conditions provided for Article 1.[1]

This Convention shall not apply to carriage performed under the terms of international conventions.[2]

CHAPTER II
Documents of Carriage

Section I—Passenger Ticket

Article 3

In the carriage of travelers the carrier shall be required to deliver a passenger ticket which shall contain the following particulars:

(a) the place and date of issue;

(b) the points of departure and of destination;

(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;

(d) the name and address of the carrier or carriers.

The passenger ticket shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention.

The absence, irregularity, or loss of this document of carriage shall not prejudice either the existence or the validity of the contract of carriage.

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1 The following English reservation will appear in the closing protocol: "The British Government reserves the question of the application of the Convention to aircraft belonging to the State, including the organs of the central government who enjoy, according to English law, the prerogatives of the Crown".

2 Translators' note: The word "postales" did not appear in the text from which this translation was made, and we suspect that its omission was through mere error: Therefore, the final phrase should read "of international postal conventions".

If, for international carriage, the carrier accepts the traveler without having drawn up a passenger ticket, or if the ticket does not contain the particulars indicated hereabove, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the faults of his servants.

Section II—Baggage Check

Article 4

In the carriage of baggage, other than small personal objects of which the passenger himself retains custody, the carrier shall deliver a baggage check.

Delivery of the baggage to the traveler shall be validly made to the bearer of the check.

The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

It shall contain the following particulars:

(a) the place and date of issue;

(b) the points of departure and of destination;

(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;

(d) the name and address of the carrier or carriers;

(e) the number of the passenger ticket;

(f) indication that the check is made out in duplicate;

(g) indication that the delivery of the baggage to the traveler shall be validly made to the bearer of the check.

The baggage check shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the Convention.

The absence, irregularity, or loss of this baggage check shall not prejudice either the existence or the validity of the contract of carriage.

If, for international carriage, the carrier accepts baggage without having made out a ticket, or if the ticket does not contain the particulars indicated hereabove up to and including (d),

the contract of the carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servants.

Section III—Air Waybill

Article 5

Every carrier of goods shall have the right to require the consignor to make out and hand over a document entitled: air waybill; every consignor shall have the right to require the carrier to accept this document.

Nevertheless, the absence, irregularity, or loss of this document shall not prejudice either the existence or the validity of the contract of carriage.

Article 6

The air waybill shall be made out by the consignor in three copies and handed over with the goods.

These three parts shall have the same value.

The first part shall bear the indication "for the carrier"; it shall be signed by the consignor. The second part shall bear the indication "for the consignee"; it shall be signed by the consignor and the carrier or their agents, and it shall accompany the goods. The third part shall be signed by the carrier or his agent, and handed over by him to the consignor after acceptance of the goods.

The signature of the carrier shall be affixed upon the acceptance of the goods.

The signature of the carrier may be replaced by a stamp; that of the consignor may be printed or replaced by a stamp.

Article 7

The carrier of goods shall have the right to require the consignor to make out different air waybills when there are several parcels.

Article 8

The air waybill shall contain the following particulars:

(a) the place and date of its execution;

(b) the points of departure and of destination;

(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;

(d) the name and address of the consignor;

(e) the name and address of the carrier or carriers;

(f) the name and address of the consignee, if the case so requires;

(g) the nature of the goods and the indications necessary for their identification;

(h) the number, the method of packing, the particular marks or numbers on the parcels;

(i) the weight, the quantity, the volume, or the dimensions of goods;

(k)[1] the freight, if it is stipulated, the date and place of payment, and the person who is to pay it;

(l) the price of the goods and, eventually, the amount of charges, if the shipment is made for cash on delivery;

(m) the amount of the sum representing the interest in the delivery, declared conforming to Article 23, paragraph 2;

(n) the number of copies of the air waybill;

(o) the documents forwarded to the carrier to accompany the air waybill;

(p) The period of the carriage, if it has been stipulated;

The particulars indicated under letters (a) through (g), inclusive, must be compulsorily entered in the air waybill.

Article 9

The air waybill shall contain a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention.

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1 Translators' note: There was no letter "j" in the text from which this translation was made.

Article 10

The consignor shall be responsible for the correctness of the indications and declarations concerning the goods which it has inserted in the air waybill.

The consignor shall be liable for all damage sustained by the carrier or any other person by reason of the irregularity, incorrectness, or incompleteness of its indications and declarations.

Article 11

The waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods, and of the conditions of carriage.

The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of parcels, shall be *prima facie* evidence of these facts; those relating to quantity, volume, and the condition of the goods shall not constitute evidence against the carrier except insofar as they have been verified by him in the presence of the consignor, and stated in the air waybill, or insofar as they relate to the apparent condition of the goods.

Article 12

The consignor shall have the right to dispose of the goods by withdrawing them at the aerodrome of the departure, or by stopping them en route upon landing, or by having them delivered at the place of destination or en route to a person other than the consignee indicated on the air waybill, or by demanding their return to the aerodrome of departure, provided that the exercise of this right bears no prejudice either to the carrier or to other consignors, and that he shall be obligated to repay the expenses which result therefrom.

If the carrier complies with the orders of the consignor for the disposition of the goods without requiring the production of the copy of the air waybill delivered to him, he shall be liable, without prejudice to his right of recovery against the consignor, for any damage which may have been caused thereby to any interested party.

The right of the consignor shall cease at the moment when that of the consignee shall begin, in accordance with Article 13 below. Nonetheless, if the consignee refuses the air waybill or the goods, the consignor shall retain his right of disposition.

Article 13

Except for the cases indicated in the preceding article, the consignee shall have the right, upon the arrival of the goods at the point of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him on payment of the charges due and on complying with the conditions of carriage set out in the air waybill and, if the shipment is made for cash on delivery, of the amount which is fixed thereon. Unless it is otherwise agreed, the carrier shall advise the consignee upon the arrival of the goods.

If the loss of the goods is brought to the attention of the carrier or is recognized by him or if, at the expiration of a period of seven days after the date on which they should have arrived, the goods have not arrived, the consignee shall be authorized to exercise against the carrier the rights resulting from the contract of carriage.

Article 14

The consignor and the consignee shall be able to enforce all the rights conferred upon them respectively by Articles 12 and 13, each one in his own name, whether he is acting in his own interest or in the interest of others, provided that he carries out the obligations that the contract imposes.

Article 15

Articles 12, 13 and 14 shall not affect either the relations between the consignor and the consignee or the relations of third parties whose rights are derived either from the carrier or the consignee.[1]

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1 Translators' note: The official French text of the final Convention contains the words "soit de l'expiditeur" and not "soit du transporteur", and thus we believe that this sentence should read "either from the consignor or from the consignee". However, we also note that this apparent error was overlooked during the discussion of Article 15. See discussions, page 204.

Any clause deviating from the provisions of Articles 12, 13 and 14 shall be entered in the air waybill.

Article 16

The consignor shall furnish such information and attach to the air waybill such documents which, before the delivery of the goods to the consignee, are necessary to meet the formalities of Customs, octroi, or police. The consignor shall be liable to the carrier for all damage which could result from the absence, insufficiency, or irregularity of such information and documents except in the case of fault on the part of the carrier.

The carrier shall not be required to inquire if such information and documents are exact or sufficient.

Article 17

If, for international carriage the carrier accepts goods without having made out an air waybill, or if the air waybill does not contain all the indications set forth by Article 8(a) through (g) inclusive, and by Article 9, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability of that derived from his servants.

Section IV—Provisions Common to Documents of Carriage

Article 18

Nothing in the present Convention shall prevent the parties, in the case of combined carriage, from inserting in the document conditions relative to other means of carriage, provided that the provisions of the present Convention be respected as regards the air carriage.

Article 19

A model of the different documents of air carriage is set out in the annex to the Convention, and their adoption is recommended to interested parties.

CHAPTER III
Liability of the Carrier

Article 20

The period of carriage, for the application of the provisions of the present chapter, shall extend from the moment when travelers, goods or baggage enter in the aerodrome of departure to the moment when they leave the aerodrome of destination; it shall cover no such carriage outside the boundaries of an aerodrome other than by aircraft.

All loss, damage, or delay shall be presumed, except where otherwise shown, to have occurred during this period, if in the execution of the contract of air carriage there has been, for the purpose of loading, delivery, or transshipment, carriage performed otherwise than by air.

Article 21

The carrier shall be liable for damage sustained during carriage:

(a) in the case of death, wounding, or any other bodily injury suffered by a traveler;

(b) in the case of destruction, loss, or damage to goods or baggage;

(c) in the case of delay suffered by a traveler, goods, or baggage.

Article 22

The carrier shall not be liable if he proves that he and his servants have taken the reasonable measures to avoid the damage or that it was impossible for them to take them, unless the damage arises out of an inherent defect in the aircraft.

In the carriage of goods and baggage, the carrier shall not be liable for errors of piloting, of flying of the aircraft, or of navigation, if he proves that he himself took reasonable measures to avoid the damage.

Article 23

The liability of the carrier shall be limited to the sum of 25,000 francs per traveler. Nevertheless, through a special agreement with the carrier the traveler shall be able to fix a higher limit of liability.

In the carriage of goods, as well as of baggage, the liability of the carrier shall be limited to the sum of 100 francs per kilogram except in the case of a special declaration of value made by the consignor at the time of delivery of the parcels to the carrier, and on condition of having paid a supplemental tax if the case so requires. In this case, the carrier shall be required to pay the sum declared unless he proves that the sum declared is higher than the real value at the point of destination or than the actual value to the consignor at delivery.

As regards objects of which the passenger himself retains custody, the liability of the carrier shall be limited to 1,000 francs per traveler.

The values hereabove are gold values. They shall be able to be converted into each national currency in round figures.

Article 24

In the cases provided for in Article 21, even in the case of death of the interested party, any liability action, however founded, can be brought only under the conditions and limits set forth by the present Convention.

If the damage arises from an intentional illicit act for which the carrier is responsible, he will not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servants.

Article 25

Any clause tending to exonerate the carrier from his liability or to set up a limit which is lower than that fixed in the present Convention shall be null and void. But the nullity of this clause shall not lead to the nullity of the contract which remains subject to the provisions of the present Convention.

Nothing shall prevent the carrier from formulating regulations which are not contradictory to the provisions of the present Convention.

Article 26

The liability action shall be brought, at the plaintiff's option, in one of the Contracting States, either before the court of the principal place of business or of the place where the carrier has an establishment through which the contract was concluded, or before the court of the place of destination, or, in the case of the non-arrival of the aircraft, of the place of accident.

In the case of death, all suits shall be brought before the first court to have regularly taken jurisdiction.

Questions of procedure shall be governed by the law of the court having taken jurisdiction; nevertheless, no particular formality or security bond can be required of the plaintiff by reason of his nationality.

Article 27

The pick-up of the goods, without protest, by the consignee, shall constitute *prima facie* evidence, that the goods have been delivered in good condition and conforming to the document of carriage. Nevertheless, in the case of non-apparent damage or of delay, the consignee shall have a period of seven days from the receipt of goods to protest to the carrier or to his agent at the place of delivery.

All protest shall be made by reservation inserted on the document of carriage or by another writing sent within seven days from receipt of the goods.

The same presumption and the same periods of protest shall apply for delivery of the baggage to the traveler.

Article 28

The liability action shall be instituted within a period of two years counted from the arrival at the destination or from the date on which carriage stopped.

The method of calculating the period of limitation, as well as the causes of suspension and interruption of the period of limi-

tation, shall be determined by the law of the court having taken jurisdiction.

Article 29

In the case of carriage governed by the definition of the third paragraph of Article 1 to be performed by several successive carriers, each carrier who accepts travelers, baggage, or goods shall be subject to the rules set forth by this Convention, and shall be deemed to be one of the Contracting Parties to the contract of carriage, insofar as the contract involves that part of the carriage which is performed under his control.

In the case of such carriage, the traveler or his representative shall be able to have recourse only against the carrier who performed the carriage during which the accident occurred, except for the case where, by express stipulation, the first carrier assumed liability for the whole journey.

In the case of goods or baggage, the consignor shall have recourse against the first carrier and the consignee who is entitled to delivery shall have recourse against the last carrier and, moreover, each may act against the carrier having performed the carriage during the course of which the loss, damage, or delay occurred. These carriers shall be jointly and severally liable to the consignor and the consignee.

CHAPTER IV
General Provisions

Article 30

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred, by which the parties deviate from the rules of the present Convention, either by a determination of applicable law or by altering the rules of jurisdiction, shall be null and void. Nevertheless, arbitration clauses shall be allowed, subject to the present Convention, when the arbitration is to take place within the jurisdictions provided for in Article 26, paragraph 1 hereabove.

Article 31

Nothing contained in the present Convention shall prevent the carrier from refusing to conclude a contract of carriage.

II

PROPOSALS OF AMENDMENTS SUBMITTED TO THE WARSAW CONFERENCE

preceded by the report of the preparatory committee instituted by the conference.

A.

PREPARATORY COMMITTEE

Proposals on the Order of Discussion

The committee, after having analyzed the various amendments presented by the different delegates, has deemed it oportune to retain in the first place the amendments touching questions relating to the very essence of the draft of the Convention and for which certain delegates would eventually have to ask instructions from their Governments.

These essential questions can be grouped under four headings:

I

Those which concern the theory of the system of liability:

(a) Japanese amendment: reservation of national laws on the system of liability, (Article 25).

(b) British, French and Soviet amendments: liability in the case of errors of piloting in the carriage of passengers, (Article 22, paragraph 2).

(c) British, French and Swedish amendments: exclusion of inherent defect of the aircraft, (Article 22, paragraph 1).

(d) British, German, Polish and Hungarian amendments: liability in the case of delay, (Article 21, (c)).

(e) German amendment: gross negligence of the carrier likened to willful misconduct, (Article 24, paragraph 2).

(f) French and British amendments: distinguishing personal fault of the carrier from that of his servants, (Article 24, paragraph 2).

II

Scope of liability:

(a) German, Italian, British, Brazilian, Hungarian and Soviet amendments: definition of the period of carriage, (Article 20, paragraph 1).

(b) French amendment: case of exceptional carriage, (New Article).

III

Limitation of liability:

French amendment: reduction of the figure for goods, (Article 23, paragraph 2).

IV

As to the liability action:[1]

(a) British, Hungarian amendments: questions of delay as regards the period for protest, (Article 13).

German, British, French, Japanese amendments:[2] period of time as regards the period for protest, (Article 27, paragraph 1).

British, French and Japanese amendments on paragraph 2.

(b) Italian amendment: replacement on the principle of prescription by that of plea in bar, (Article 28, paragraph 1).

(c) British amendment: effect of the pick-up of goods without protest, (Article 27, paragraph 1).

(d) British amendment: competence of the place of accident (Article 26, paragraph 1).

(e) German amendment: elimination of the option of arbitration, (Article 30).

(f) British amendment: recourse against successive carriers, (Article 29, paragraph 3).

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1 See also: Minutes of the sessions, page 116—German amendment relating to Article 26.

2 See also: Minutes of the sessions, page 97—Swiss amendment relating to Article 27.

Analysis of the Amendments

Title of the Convention

Proposal from the Delegation from the USSR and proposal from the German Delegation: the referring to the drafting committee is proposed.

Preamble

Polish and British proposals to be referred to the drafting committee.

Article 1

Paragraph 1:

British proposal: "The present Convention shall apply to any international carriage of passengers, goods and baggage performed by aircraft for remuneration. The Convention shall also apply to free carriage performed by aircraft by an air transport company". [Question of wording.]

Japanese proposal (omission of the words "by aircraft for remuneration or not"). [Question of substance (2).]

Paragraph 2:

British proposal (special situation of the Empire) in relation to the Polish proposal, letter (d). [Question of substance (2).]

Paragraph 3:

British proposal linked to the question envisaged by the previous paragraph.

German proposal. [Question of wording.]

Paragraph 4:

British proposal. [Question of wording (in relation to the provisions of Article 20).]

Additional paragraph:

Brazilian proposal (definition of the carrier). [Question of substance (2).]

For the record: Eliminate from the last line of the third paragraph the word "which".

Article 2

For the record: Add after the word "convention" at the last line, the word "postal".

The Czechoslovakian and German observations which had been presented, disappear by virtue of this correction.

Article 3

Paragraph 1:

Polish proposal. [Question of substance (2).]

Letter (c): German, British and Hungarian proposal. [Question of substance (2).]

Letter (d): Italian proposal. [Question of wording.] German and British proposal. [Question of substance (2).]

Letter (e) additional: German and Czechoslovakian proposals, (cost of carriage). [Question of substance (2).]

Letter (f) additional: Polish and Brazilian proposal (indication of the traveler). [Question of substance (2).]

Paragraph 4:

Japanese proposal with regard to the last paragraph of Article 4—It shall be necessary to take up the same general wording formula.

Greek proposal (sanctions). [Question of substance (2).]

German proposal. [Question of wording.]

Article 4

Paragraph 4:

Letter (a): British proposal (elimination). [Question of substance (2).]

Letter (c): British, German and Hungarian proposal (elimination). [Question of substance (2).]

Letter (d): Italian proposal. [Question of wording.] German proposal (elimination). [Question of substance (2).]

Letter (f): British proposal (elimination). [Question of substance (2).]

Letter (h) additional: Swiss and German proposals (addition of the number of parcels, etc. . .). [Question of substance (2).]

Letter (i) additional: German proposal (interest in the delivery). [Question of substance (2).]

Letter (l) additional: German and Czechoslovakian proposal (cost of carriage). [Question of substance (2).]

Paragraph 5:

German proposal. [Question of wording.]

Last paragraph:

Japanese proposal (see Article 3, last paragraph).

Second Japanese proposal (compulsory particulars). [Question of substance (2).]

Swiss proposal (new compulsory particulars). [Question of substance (2).]

Greek proposal (see Article 3). [Question of substance (2).]

Article 5

Hungarian proposal. [Question of substance (2).][1]

Article 6

Paragraph 3:

German proposal (value of the copies). [Question of substance (2).]

British, Japanese and German proposals (agency question). [Question of wording.]

Second British proposal and Hungarian proposal (delivery of the document to the consignor upon his request). Last additional paragraph to Article 6.[1] [Question of substance (2).]

Article 6 bis

New article proposed by the French Delegation, and linked to the additional Article 6 of the British Delegation (presumption of signature on behalf of the consignor). [Question of substance (2).]

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1 Corrected during the session after the distribution.

Article 8

Letter (c): German, British and Hungarian proposal: (see Articles 3 and 4). [Question of substance (2).]

Letter (d): Brazilian proposal: Add the name and the address of the agent. [Question of substance (2).]

Letter (e): French proposal accepted by the British and German Delegations: put "of the first carrier". [Question of substance (2).]

Letter (g): Swiss proposal: Strike out the paragraph after "the nature of the goods". [Question of substance (2).]

Letter (i) bis: Swiss proposal. [Question of substance (2).]

Letter (i) ter: British proposal. [Question of substance (2).]

Letter (l): German proposal. [Question of substance (2).]

Letter (e): Hungarian proposal: Add the name and address of the consignor. [Question of wording.]

Letter (f): Hungarian proposal: Elimination of "if it is necessary". [Question of wording.] Swedish proposal: the waybill drawn to the bearer. [Question of substance (1).]

Last paragraph:

Brazilian proposal: Add the reservation "without prejudice to the regulation of each State of the bills of lading, manifests and any other documents for carriage of goods". [Question of substance (1).]

German, Italian, Swiss proposals on compulsory particulars. [Question of substance (2).]

Article 10

Swedish proposal not drawn up. [Question of substance (2).]

Article 11

Paragraph 2:

German proposal: Add the word "packing" after the word "condition". British proposal: Eliminate the word "packing". [Question of wording.]

Italian proposal. [Question of substance (2).]

Article 12

Paragraph 1:

Czechoslovakian proposal. [Question of wording.]

Polish proposal. [Question of substance (2).]

Addition: proposed by the British Delegation. [Question of wording.]

Japanese proposal on the requirement of a waybill. [Question of substance (2).]

Paragraph 2:

British proposal on the interpretation of the words "to all interested parties"; German proposal in the same sense. [Question of substance (2).]

Paragraph 3:

Czechoslovakian proposal on the recovery of the goods by the consignor. [Question of substance (2).]

Article 13

Last paragraph:

British, Hungarian, Swiss proposal on the question of the period of time. [Question of substance (1).]

Paragraph 3:

Proposal made in session by the Japanese Delegation to put "by the carrier" instead of "to the carrier". Proposal backed by the British Delegation. [Question of wording.]

Article 14

French and Hungarian proposal on the double action of the consignor. [Question of substance (2).]

Article 16

Paragraph 1:

British proposal: Add "or his servants". [Question of wording.]

Article 17

Italian proposal. [Question of substance (2).]

For the record: Revision of the last line of the text for addition of the word "errors".

Article 18 bis

Brazilian proposal drawn up regarding Article 13 on the retention of the documents for two years. [Question of substance (2).]

Article 19

Hungarian and French proposals concerning the models of the documents. [Question of substance (2).]

Swiss proposal on the distinction of models. [Question of substance (2).]

Article 20

Paragraph 1:

Brazilian, British, Hungarian, Swiss and Soviet proposals on the period of carriage. [Question of substance (1).]

Italian proposal. [Question of wording.]

Paragraph 2:

German proposal: Elimination of the words "any loss or delay". [Question of wording.]

British proposal. [Question of substance (2).] (To be added to the second paragraph, or make a new Article 20 bis.)

Article 21

British proposal: Elimination from the first line of the words "during the carriage" and add them after (a), (b), (c). [Question of wording.]

Letter (b): German proposal: Add the word "checked" after the word "baggage".

Letter (c): British proposal: Add "except as otherwise agreed".

For the record: See the German observation at Article 25. [Question of substance (1).]

Polish proposal: Elimination of the word "traveler". [Question of substance (1).]

Article 22

Paragraph 1:

British, French, and Swedish proposal: Elimination of the last part of the paragraph. [Question of substance (1).]

Soviet proposal presented in committee: "In the first paragraph put the words 'all necessary measures' instead of 'the reasonable measures' ". [Question of wording.]

Italian proposal on the inherent defect of the goods. [Question of substance (1).]

Paragraph 2:

Soviet proposal presented in committee: Elimination of the paragraph. [Question of substance (1).]

British proposal. [Question of wording.]

French proposal: Elimination of the first part of the paragraph up to "the carrier". [Question of substance (2).]

British proposal for the addition of a third paragraph. [Question of substance (1).]

Danish proposal for the addition of a third paragraph in relation to Articles 4 and 21. [Question of wording.]

Article 23

Paragraph 1:

French and Swiss proposal. [Question of substance (2).]

British proposal. [Question of wording.]

German proposal for an additional paragraph (life annuity). [Question of substance (2).]

Polish proposal for an additional paragraph aiming at the case of delay. [Question of substance (2).]

Paragraph 2:

For the record: French proposal: Consequence of the proposal mentioned at the first paragraph. [Question of substance (1).]

British proposal. [Question of wording.]

Swiss proposal for a special limitation of liability in the case of delay. [Question of substance (1).]

Paragraph 3:

German proposal (1,000 francs). [Question of substance (1).]

Paragraph 4:

French proposal: Consequence of the proposal made at Article 1. [Question of substance (1).]

Article 24

Paragraph 1:

German proposal: Replace "the interested party" by "the injured party". [Question of wording.]

Swiss proposal to add a paragraph 1 bis: The categories of persons who are authorized to receive the sums due from the carrier following an accident for which he is considered liable shall be determined by the national law of the deceased. (See additional German proposal to paragraph 2.)

Paragraph 2:

German proposal: gross negligence likened to intentional act. [Question of substance (2).]

German proposal to add a supplementary paragraph indicating that the question of the representatives is not settled. [Question of wording.]

French proposal: modification of the end of the paragraph. [Question of substance (2).]

Observation of the British Delegation on the interpretation to be given to the rule set forth. [Question of substance (1).]

British proposal: Referral to national law for the liability provided for in case of illicit act. [Question of substance (2).]

Article 25

Paragraph 1:

Japanese proposal on the reservation of national law. [Question of substance (1).]

German proposal "except for the case of delay" (see Article 22). [Question of wording.]

Paragraph 2:
German proposal: Add the words "within the present Convention". [Question of wording.]

Article 26

For the record: The German Delegation reserves the right to present amendments of substance for paragraphs 2 and 3.

Paragraph 1:
Proposal of Great Britain (Contracting State). [Question of wording.]
British proposal: Elimination of the competence of the place of accident. [Question of substance (2).]
Additional proposal of the Hungarian Delegation on paragraph 1. [Question of wording.]

Paragraph 2:
Japanese and British proposal for its elimination. [Question of substance (1).]
Proposal for an additional paragraph by the British Delegation. [Question of substance (2).]

Paragraph 3:
British proposal on the role of nationality. [Question of substance (2).]

Article 27

Paragraph 1:
British proposal: Add to the first line the word "acceptance". [Question of wording.]
Four[1] proposals concerning the period of time. [Question of substance (1).]

Paragraph 2:
German proposal on non-apparent damage or delay. [Question of wording.]
British, French, Japanese proposal on the period of time. [Question of substance (1).]

1 See also Swiss amendment—Minutes page 97.

Paragraph 1:
British proposal: Elimination of the words "except for contrary proof". [Question of substance (2).]

Paragraph 3:
British proposal (see paragraph 2). [Question of substance (1).]

Last paragraph:
Swiss proposal on the period of protest. [Question of substance (1).]

Article 28

Paragraph 1:
German proposal: The moment when they should have arrived. [Question of wording.]
Hungarian proposal on the possibility of adopting Article 45 of the Bern Convention. [Question of substance (1).]
Italian proposal: plea in bar instead of period of limitation. [Question of substance (1).]

Article 29

German proposal on the classification of Articles 25 to 29. [Question of wording.]
Paragraph 2:
British proposal: Add to the third line the words "or of delay" (consequence of the general problem of delay).

Paragraph 3:
British proposal: recourse against successive carriers. [Question of substance (1).]

Article 30

German proposal: Elimination of arbitration. [Question of substance (1).]
Japanese proposal: Option to deviate from the rules of competence. [Question of substance (2).]

Article 31 bis

Czechoslovakian proposal to add an additional article. [Question of substance (2).]

French proposal to add an article for exceptional carriage. [Question of substance (2).]

British proposal for an additional article. [Question of wording.]

Polish proposal for a modification in relation to Article 3.

Swiss proposal for a periodic revision of the Convention in relation to article (e) of the Polish proposal.

The German Delegation proposes to arrange the articles in the following order: 25-27-29-28-26.

Soviet proposal presented in committee: Reduce the term provided to six months. (Article (c)).

Similar proposal of the Swedish Delegation. (Article (e)).

Closing Protocol

Additional clause to Article 1 to be inserted in the closing protocol as it has been proposed by the German Delegation (non-reciprocity vis-a-vis Non-Contracting States).

EXHIBIT C

Doc 7686-LC/140

INTERNATIONAL CIVIL AVIATION ORGANIZATION

INTERNATIONAL CONFERENCE
on Private Air Law

The Hague, September 1955

Volume I

MINUTES

September 1956

MONTREAL CANADA

ELEVENTH MEETING

(Tuesday, 13 September 1955 at 1445 hours)

President Mr. D. Goedhuis

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29. CONSIDERATION OF THE DRAFT PROTOCOL ARTICLE BY ARTICLE—First Reading

Report of the Working Group on Article 3 of the Convention

B. Notice to the person concerned in regard to the applicability of the Convention (Continuation of discussion)

Mr. Cooper (IATA) referred to the text which the United Kingdom had proposed for the statement on the passenger ticket, which text would read as follows:

> "Carriage which is 'international', as defined by the Convention of Warsaw of 12th October, 1929, is subject to conditions which limit the air carrier's liability for death or personal injury as provided in the said Convention, such liability being limited to . . . . . Poincaré gold francs."

He also referred to the proposed text of a statement presented by the United States Delegation, the text reading as follows:

> "*Advice to International Travellers*
>
> Travellers embarking upon a journey involving an ultimate destination or stop in a country other than the country of origin are advised that the Warsaw Convention may be applicable to their journey. The Convention governs the liability of carriers to passengers and shippers and limits liability for personal injury or death in most cases to . . . . . Poincaré gold francs."

Under either of these two texts it was possible for the carrier to use a single form of ticket for Warsaw or non-Warsaw traffic, while under the Rio Protocol there was the difficult traffic position where one had to use two separate forms of ticket. If a carrier used the form of ticket with the Rio statement on it for non-Warsaw traffic, he would be guilty of a misrepresentation to the passenger. He hoped that the delegations would choose either the United States or the United Kingdom formula, as they were practicable.

Mr. Heller (New Zealand) noted that the United Kingdom and United States proposals expressed the limit of liability in Poincaré gold francs and he doubted whether this would bring to the notice of the general public the certain amount up to which the liability was limited. He suggested that the proposals be amended so that the amount of the limit would be expressed in the national currency of the carrier with a margin to allow for fluctuations in valuation; if that were not acceptable, it would be preferable not to make any reference to the amount of the limitation.

Mr. Alten (Norway) preferred his own proposal which read as follows:

> "If the place of departure or destination or an agreed stopping place is not situated within the territory of the State where the ticket is issued, it shall also contain, or have attached to it, an advice to the passenger, that the liability of the carrier may be subject to limitation under the provisions of this Convention or of applicable national law."

This would be an addition to Article 3(1) of his proposal made at an earlier meeting.[1]

He felt that the amount of the limit of liability should not be mentioned either in Poincaré gold francs or in a national currency.

Mr. Wilberforce (United Kingdom) said, in a reply to a question of the President, that the reference to the Poincaré gold francs had been included in the United Kingdom proposal pursuant to a suggestion made in the Working Group. However, since there was now some opposition to referring to the amount of the limit in the text, it might be better to put the United Kingdom proposal to vote without the reference to the amount and then take a separate vote on the question whether the mention of gold francs should be added or not.

Mr. Sidenbladh (Sweden) said that a reference in the ticket to Poincaré gold francs would mean nothing to the man in the

1 See II, 233.

street. Moreover, it would be against the Convention if, on the ticket, one tried to convert these francs into national currencies according to the gold value at a date other than the date of judgment.

A first vote should be taken on the proposals without taking into account whether they contained the amount of the limit or not and then the Conference could have a special vote on whether a reference to the amount of the limit stated in terms of a currency should be added.

He found it difficult to make a choice between the United States and the United Kingdom proposals, as the first required to be put in somewhat more legal language, while the second had to be made less legal and more comprehensible for the man in the street.

Mr. Findziński (People's Republic of Poland) preferred the more general form of statement as set out in the Rio text, to the proposal of the United States (see above) and that of the IATA, the latter reading as follows:

> "The ticket shall also contain a statement that travellers embarking upon a journey involving an ultimate destination or stop in a country other than that of the place of departure are advised that the Warsaw Convention may be applicable to their journey and that the Convention governs the liability of carriers to passengers and limits liability of carriers to passengers for personal injury and death in most cases to . . . . . Poincaré gold francs."

Mr. Booth (Canada) said that his Delegation could support either the United Kingdom or the United States proposal, although it would be more inclined to accept the United Kingdom proposal since the language in the other proposal was rather loose.

He suggested that, when the vote on all the various proposals took place, a vote on the principle behind the United Kingdom and the United States proposal be taken and that, if this principle received the greatest number of votes, then there could be a vote between the United Kingdom and the United States text.

He did not agree with the Observer from the IUAI who had said that the text concerning the notice should not refer to the number of Poincaré gold francs involved, because some passenger might get the idea that he would receive that amount in any event. The objection of the IUAI Observer was quite irrelevant to the problem before the Conference. The Conference was concerned with having the person concerned receive notice. What were the consequences to that person if he mistakenly believed that he was insured for the amount stated in the notice? The answer was that this person could make up his own mind as to whether or not he would insure for a greater amount. However, although it would serve a useful purpose to mention the amount of Poincaré gold francs, it would not be practical to translate this amount into domestic currencies. The essential thing to do was to give a warning to the passenger that there was a limitation. Of course, neither the United States nor the United Kingdom proposal was a completely adequate notice because, as someone had said, in order to have such a notice the whole Convention would have to be repeated. But anyone who was not put on warning by the notice provisions of either of these proposals would probably not be interested. If a passenger were put on warning by the notice which included the amount of the limit expressed in Poincaré gold francs, then the passenger could be interested in finding out what this amount would be in domestic currencies. With a view to assisting passengers of the latter type, airlines could keep their agents informed from time to time as to the equivalent of Poincaré gold francs in domestic currencies.

He agreed with the suggestion that the question whether or not the amount of currency should be indicated might be voted on separately.

Mr. O'Connor (Ireland) said that, in the case of the notice, in order to establish a fair balance between the public interest, as represented by the passengers, and the private interest, as represented by the carriers, one had to weigh the balance a little in favour of the passenger who was in an inferior position in relation to the knowledge of the law governing the carriage. The proposals before the meeting merely paid lip-service to the principle that the passenger should have knowledge of the Convention. These proposals tried to make the passenger aware of the existence of the Convention, but made no effort to tell him what the Warsaw Convention covered, or in what circumstances it would operate. Only the United States proposal attempted to go a little in that direction.

He felt that the United States proposal should be strengthened. The word "advice", as used in the heading of that proposal, was not sufficiently strong. The word "notice" would draw the attention of the passengers. Moreover, the word "international" should be deleted from the heading because the traveller might not know that he was an "international" traveller and might not read the notice if he were travelling between two points under the same jurisdiction unless it was made clear to him that the journey involved an intermediate stopping place in another country and that such stopping place would make the journey international.

The notice should also state that the liability of the carrier for personal injury or death of a passenger was limited and also express the maximum amount of the limit of liability in local currency.

The United States notice should further state that the passenger might inspect a list of signers of the Warsaw Convention if he so desired. Such a list would be kept in the ticket offices.

Mr. Poulton (Australia) said that one difficulty had not been mentioned up till that time, namely, that States might find themselves parties to both the Warsaw Convention and the Convention as amended by the Protocol. If that problem were not solved, the booking clerk would find it difficult to know which system applied: the Warsaw Convention alone, the Convention as amended by the Protocol, or no Convention at all.

He agreed with Mr. Cooper that there was a vital difference between the Rio text on the one hand and the proposals of the United States and the United Kingdom on the other hand. He supported the principle behind the latter proposals but inclined toward the language of the United Kingdom proposal. The principle behind the United Kingdom and the United States

proposals would operate to give the passenger all the notice that was required.

The notice provision should contain no reference to the amount of the limit of liability.

Mr. Garnault (France) said that the United States proposal had been attacked on the basis of its drafting. He felt that it was too early to discuss the proposal on this basis, and that it should be considered on the basis of the principle behind it.

On a point of substance, the United States proposal had been criticized because it expressed the limit of liability in figures, these figures being expressed in terms of Poincaré gold francs. He considered that it was not enough merely to say that the liability of the carrier was limited if the liability were expressed in terms of Poincaré gold francs, at least the attention of the passenger would be drawn to the specific nature of the limit. That would lead the passenger to have the natural reaction of insuring himself in any case where he considered that a limitation of liability would lessen his rights. That was the practical interest of the United States proposal.

The French Delegation had earlier stated its preference for the Rio text, but had tried to reach a compromise with the other points of view. It now saw a desire among some to return to the Rio text. He pointed out that the vote which would be taken on the United States or British proposal would be followed by a vote on the sanction and that the heavier the burden imposed on the carrier, from the point of view of the particular which should be included in the ticket, the less certain Delegations would be prepared to impose the sanction of unlimited liability which was the one provided by the Rio Protocol. Consequently, those who wished to have the notice provision coupled with the sanction of unlimited liability should not be too demanding in regard to the notice which should be included in the ticket.

The Conference took a tentative vote on the three proposals concerning the form of the notice to be included in the passenger ticket, it being understood that a subsequent vote would be taken on the question whether a reference to the amount of the limit should be included in the provision ultimately adopted; the results of the vote were as follows:

1) *The United States*[1]-IATA[2] *proposal (the respective versions being set out elsewhere) received twenty-two votes;*
2) *The United Kingdom-Israeli proposal (the text being set out above) received sixteen votes;*
3) *The text of Article III(a) of the draft Protocol which read in part: "and a statement that the carriage is subject to the rules relating to liability established by the Convention", received thirteen votes.*

(*Note*: The proposal of the Delegation of Norway set out above was not seconded.)

The Conference rejected, by a vote of 20 to 16, the proposal supported by various Delegations to insert in the text ultimately adopted concerning the notice, a reference to the amount of the limit of liability.

The Conference adopted, by a definitive vote of 20 to 10, the United States-IATA proposal (the versions being as set out above, but without the words "to . . . . Poincaré gold francs"), it being understood that it would be left up to the Drafting Committee to prepare the final text.

Mr. Calkins (United States) then proposed that Protocol specify the size and colour of the type in which the notice embodied in the United States-IATA proposal which had just been adopted should be given. The heading of the notice should be set out in letters of not less than five millimetres high.

Mr. Cooper (IATA) objected to having such provisions in the Protocol as they would impede the future handling of traffic documentation.

Mr. Garnault (France) thought that the United States proposal was a practical one. He drew attention to the precedent of insurance policies where, by law, certain clauses were required to be in heavy type.

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1 See I, 120.

2 See II, 254.

The Conference rejected, by a vote of 17 to 14, the United States proposal concerning the size and colour of the type in which the notice should be printed.

C. Sanctions

Mr. Loaeza (Mexico), Chairman of the Working Group on Article 3 of the Convention, said that Part C of the report of the Working Group was concerned with the question whether there should be sanctions included in the amended Convention and also with the question of what the sanctions should be if it were decided to include them.

Mr. Goodfellow (IUAI - ICC) once more drew attention to the proposal of the ICC that Chapter II of the Convention should be deleted leaving the question of documents of carriage to be settled on a commercial basis. Even though that suggestion had not been accepted, he still felt that it should be considered again at some stage in the discussions.

In regard to the question of sanctions, it had been generally assumed in the present discussion that Article 3 of the present Convention did not contain any sanctions. But that view was not correct since it was quite clear from Article 3(2) of the Convention that, if the carrier failed to deliver a ticket, he would lose the benefit of limited liability.

It had been suggested by some lawyers that, because Article 3(2) did not specifically refer to a ticket containing the requirements laid down in Article 3(1), the sanction did not apply if the carrier issued any form of document. It was by no mean certain that the courts would take that view.

He wished to give two examples relating to the application of Article 3(2) of the Convention.

First of all, there was the case of the bad carrier, who knew that he was operating international carriage, but who, nevertheless, sought to evade his responsibility by carrying under a document which purported to relieve him from all liability. He suggested that, in such a case, the Court would state that it was quite clear that the object of Article 3(2) was to ensure that the carrier should deliver a ticket, not necessarily in the precise form laid down by Article 3(1), but giving the appropriate

information to the passenger to show whether the Convention applied or not, to show against whom the claimant had a right of action, and, generally, to put the claimant in a position to judge his rights and to exercise them. The Court would find that the carrier in this case had completely disregarded his obligations under the Convention and had attempted to evade them. The Court would hold that this was a clear breach of Article 3 and that the carrier was liable without limit.

A second case at the other end of the scale would be one in which the ticket had been issued by a booking agent who had omitted one of the required particulars, such as an agreed stopping place. It might be a case of an unexplained accident in which the claimant would have been entitled to no recovery under the common law rules, but was entitled to recover under the Convention because, owing to the death of the crew, the carrier might not be able to prove that he and his servants had taken all the necessary measures to avoid the damage, or that it was impossible for them to do so. In such a case, with a view to avoiding the Convention limits, the claimant might contend that the omission of one of the agreed stopping places meant that the ticket did not comply strictly with the requirements of Article 3(i) and Article 3(ii) must be construed as referring to a ticket which complied with the requirements of the preceding paragraph. He thought that the Court would have no difficulty in distinguishing this case from the one first quoted, and would reject the claimant's argument. It would hold that the ticket, which contained, either expressly or by reference to the air carrier's time tables, all the material information to enable the passenger to ascertain his rights, was a ticket within the meaning of Article 3(ii), that there had been no attempt on the part of the carrier to evade his obligations under the Convention, and that he did not lose the benefit of limitation of liability.

He suggested that the foregoing constituted a correct interpretation of Article 3, and, if this interpretation were accepted, the Article did not require any amendment. It would be a retrograde step to accept the alternative which had been proposed, namely, to subject the carrier to the loss of all limitation of liability for what would always be an unintentional mistake in the case of the second carrier mentioned above. Moreover, the pro-

posed alternative would make any simplification of the documents of carriage difficult, if not impossible, and this at a time when air travel was becoming more and more general. To impose on the carrier, for an unintentional mistake, the same Draconian limit as was imposed upon him for wilful misconduct under Article 25 of the Convention did not seem to be in accordance with principles of international justice.

In view of the foregoing, the sanction existing in the Convention should be left as it was.

Mr. Garnault (France) said that the Conference was now discussing the question of sanctions in a different context than that in relation to which it had discussed the question before. Due to the adoption of the United States-IATA proposal concerning the notice to be included in the ticket, the objection originally made to the inclusion of sanctions, consisting in the difficulty which the booking clerks had in issuing tickets in proper form, no longer existed. The new notice to be included in the ticket would warn the passenger about the particular risk involved and this involved neither a risk nor a difficulty for the carriers or their servants or agents. Under these circumstances, since there was no longer any risk involved in providing for the inclusion of a notice in the ticket, his Delegation was unable to understand why any sanction applicable to the omission of such a harmless notice should not be included. The non-inclusion of a provision for sanctions would be even more curious in view of the fact that the Observer from the IUAI had pointed that if the sanctions were not included, the Courts might, perhaps, apply them. The sanction should apply in cases where there was a flagrant neglect on the part of the carrier to give a notice to the passenger. Nothing obliged the Conference to provide that the sanction would apply in the case where the carrier had forgotten to indicate the place of departure or of destination.

The effect of what he had said was that he was making a proposal that the sanction should apply in the case of the omission of the notice as set out in the United States-IATA proposal which had been adopted.

Mr. Calkins (United States) referred to the United States proposal concerning the sanctions, which read as follows:

> "Nevertheless if the carrier accepts the passenger without a passenger ticket having been delivered or if the ticket does not include the statement in the form required by Paragraph (1) relating to the applicability of the Convention he shall not be entitled to avail himself of any of the defenses which exclude or limit his liability."

This proposal related to the sanctions for failure to deliver a ticket or for failure to deliver a ticket which included the notice. The Rio text would have the same effect.

Mr. Riese (Federal Republic of Germany) said that the contents of the passenger ticket had now become so vague because of the recent decision, that one no longer knew whether the carriage was subject to the Convention or not. Moreover, the ticket would not indicate the amount which the passengers normally had a right to claim pursuant to the Convention. All that had been retained was a notice which, in effect, said that, if the Convention applied, the passenger would risk being subject to a limit, the amount of which was not indicated.

The consequence of the above-mentioned decision could be different according to one's point of view. Thus, Mr. Garnault had just said that, since there was no longer any risk for the carrier and since the latter need only do what he was told, that is, to issue a ticket containing the notice in every case, a severe sanction could be imposed on the carrier. But, it should also be said that, since the contents of the ticket were now of so little importance, it was not worth while providing for an extremely severe sanction for the case where the notice was lacking. Suppose a ticket agent issued an old form of ticket which did not contain the notice. Was that a reason for exposing the carrier, who had not, himself, issued the ticket, to unlimited liability? He (Mr. Riese) was thinking not only of the large airline, but also of the occasional small carriers who, perhaps, might carry someone even without issuing a ticket. Would they be subject to unlimited liability which would exceed the limit of their insurance? Was it just to provide for the sanction in the latter cases?

In view of the foregoing, he was against having a private law sanction in order to enforce the issue of the passenger ticket in a

particular form. No such sanction existed in relation to any other document of carriage in the other fields of transportation.

Therefore, he once more proposed that no private law sanction be included in the Convention.

Mr. Cooper (IATA) referred to the words: "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered", set forth in the second sentence of Article III(b) of the Protocol. He wondered whether these words meant that, in order to maintain the limit of liability, the carrier must prove that a ticket had been delivered to every passenger even though the aircraft had been completely lost, or that the passenger, if he survived or a claimant, had the burden of proving non-delivery. He wished it to be recorded that, in his view, the above-mentioned text required proof by the claimant that the ticket had not been delivered. If there were any doubt about this interpretation, then the text should be clarified. He was looking ahead the time of mass transportation by air where the fare would be collected on the aircraft and the ticket issued there. Under these circumstances the burden of proving that the ticket had not been issued should be on the passenger rather than on the carrier.

Mr. Calkins (United States) preferred to have sanctions imposed by private law rather than having them imposed by the various States under public law. The reasons for this preference were, first of all, that with a private law sanction there would be the possibility of applying a uniform sanction for non-compliance with the requirements of the Convention, and secondly, the policing of these sanctions would be made more easy. In regard to the second reason, he pointed out that 30 million tickets had been issued for international air carriage during 1954; it would have been impossible for any Government to check all those tickets to see whether they complied with the requirements of the Convention. In the case of private law sanctions, no heavy policing was required because, in the event that no ticket was issued, the claimant had his remedy against the carrier.

In regard to the private law sanction, the Conference had to decide whether it wished to apply the sanction to all the particulars to be included in the passenger ticket or only to a few of the particulars. He did not feel that the sanction should apply to the particulars concerning a place of departure and place of destination and the agreed stopping places. The passenger should certainly assume the obligations of seeing to it that the ticket issued to him set forth these places. However, the sanction should apply to the particulars concerning this notice.

With respect to the extent of the sanction, his Delegation had proposed that the sanction should be framed in terms of the language of the Warsaw Convention and should include the words "exclude or" (see text of United States proposal above). That was the strongest sanction that one could have. It was an appropriate sanction since it would be so easy for carriers to comply with the notice requirement.

With respect to the Australian proposal, he did not believe that a 50% increase in the limit was an adequate amount for the sanction. The claimant should be permitted to recover the amount of his proven damage.

In view of the foregoing, he submitted that the appropriate sanction was a private law sanction, that the sanction should apply only in the case of failure to issue a ticket or if a ticket were issued without the notice which had been adopted, and that the sanction should consist in the removal of the limits of liability, and the exclusion of defense.

Mr. Géomez Jara (Spain) said that only the omission of the notice concerning the possible application of the limit of liability should involve the application of the sanction of unlimited liability. The fundamental element of the Convention was that it restricted the rights of the passenger by limiting the liability of the Carrier. Therefore, it was only just and logical to draw the attention of the passenger to the possible limitation of the carrier's liability.

The sanction should involve only the loss of the limitation of liability by the carrier and should not, as was contemplated by the United States proposal deprive the carrier of defences which might exclude his liability. If, for example, the defence under Article 20 of the Convention were taken away, the consequence

would be that the carrier would not only be subject to unlimited liability, but also to absolute liability.

With regard to Mr. Cooper's remarks concerning the burden of proof in regard to non-delivery of the ticket, the Spanish Delegation felt that this was a question reserved exclusively to the law governing procedure in the country in which the proceedings took place.

Mr. Diaeddine Saleh (Egypt) was in favour of deleting too severe sanctions from the Convention.

In regard to Mr. Cooper's point concerning the burden of proof of direct link between the negligence of the carrier in issuing the document of carriage and the damage suffered by the passenger, he (Mr. Diaeddine Saleh) stated that the application of the general principles of law would place the burden of proof on the victim, the consequence being that the victim would most often find it impossible to adduce proof and would thus the negligence of the carrier would be left without a special sanction. It would be more equitable to provide that the mere proof by the victim of the negligence of the carrier would raise, as against the latter, a presumption that the damage had been caused by the carrier and then the latter would have to show that the damage was due to another cause.

Mr. Sidenbladh (Sweden) said, in regard to Mr. Cooper's comments, that it was the claimant who must prove that no ticket had been issued.

He referred to the Australian proposal on sanction which read as follows:

> "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been issued which complies with paragraph (1) of this Article the carriage shall be subject to the rules relating to liability established by the Convention except that the limits of liability specified in Article 22 thereof shall, if otherwise applicable, be increased by fifty per cent."

This was a realistic and useful compromise which gave certain advantages not only to the carriers, but also to the passengers. He hoped that the Conference might adopt this solution. He

had thought, at first, that the Australian proposal did not intend to make any change in the Rio text but, he noted that, whereas the Rio text provided for a sanction of unlimited liability, the Australian text provided for a sanction involving an increase of the limit by fifty per cent. He asked the Australian Delegate if the Australian text included any other differences as compared with the Rio text.

Mr. Poulton (Australia) said that his text had been drafted before Article III(a) of the Protocol had been finally settled, and at that time, he had not known exactly what was going to be in Article III(a). However, the effect of the Australian text was as follows: If there were a failure to deliver a ticket, or if the ticket did not include the notice which had now been adopted by the Conference, then, in either of those two cases, the carrier, instead of being liable without limit, would be liable to the extent of the limit increased by fifty per cent. For that matter he had no objection to the limit being doubled. The idea was to establish the sanction at a reasonable and insurable level instead of eventually reaching some prodigious figure which had no relation whatever to the damage which followed from the non-issuance of the ticket or the omission of the notice.

In view of Mr. Sidenbladh's comments, he would reframe the first part of his proposal in the terms of the Rio text so that it would read thus:

> "Nevertheless, if the carrier accepts the passenger without a passenger ticket having been delivered, or if the ticket does not include the statement in the form required by paragraph (1) relating to the applicability of the Convention the carriage shall be subject . . ."

Mr. Drion (Netherlands) said, in relation to Mr. Cooper's remark concerning the burden of proof with respect to the non-delivery of the passenger ticket, that, under the Warsaw Convention, there could be no doubt as to the burden of proof being on the claimant if he wanted to have unlimited liability imposed on the carrier. The limitation of liability was the rule and there was a certain provision which said that, in certain circumstances, that rule would not apply. It was up to the claim-

ant to prove that these circumstances existed. Consequently, no special provision was required in the Protocol on this point.

It would be over-simplifying the question before the Conference to say that it had to make a choice between the possibility of a public law sanction, on the one hand, and that of a private law sanction, on the other. In the field of private law sanction there was a choice among three possibilities: 1) There was the normal private law sanction for non-compliance with certain obligations, namely, the sanction that one who did not comply with his obligations had to pay compensation for damage resulting from that non-compliance; 2) there was the sanction of unlimited liability without any relation to the actual damage arising from the non-compliance of the carrier with the obligations imposed upon him; 3) there was the sanction of a limited and absolute liability without any relation to the damage arising from the non-compliance.

There had been a curious opposition from those most interested in protecting the passenger by the notice in the ticket, against applying to the carrier the normal sanction of payment of compensation for damage resulting from the non-compliance of the carrier with the obligations imposed upon him. These persons contended that the passenger had an interest in having the obligations of delivering a ticket and including the notice in the ticket imposed upon the carrier. One would think that, if the passenger had an actual interest, then, if these obligations were not complied with, the passenger would suffer actual damage, since the non-compliance and the damage would be related to each other. But the same people said that, if the sanction consisted in the payment of compensation for actual damage, that would be no sanction at all. This was the same thing as saying that the passenger would never suffer actual damage because of the non-compliance, or that, at least, the damage would not be provable. Consequently, the people above-mentioned rather doubted about the actual interest which the passenger had in the notices on the ticket.

It might be suggested that, since a question of proof was involved, a presumption that damage had been caused could be created as against the carrier. But such a presumption could only be created if it were felt that, generally, actual damage

would result from the non-compliance of the carrier. As it is hardly likely that actual damage will result from the non-compliance, there was no real basis for the above-mentioned presumption. Moreover, in the case where the passenger had taken out a very big accident insurance, there would be no actual damage resulting from the carrier non-compliance and the sanction would, in this case, be imposed without any rational basis.

He agreed with a remark made by Mr. Riese at an earlier date to the effect that the system of the sanction resulted in a great lack of equality between passengers. Those having a ticket with an omission would be in more favourable position than those who had a ticket issued in due form, since the former could claim unlimited liability on the part of the carrier, while the latter could only claim limited liability.

He said that it should be made clear, in voting on the Rio text which text spoke of a non-availability to the carrier of any provisions which limited his liability in respect of the passenger, whether that text referred only to the limits of Article 22 or was intended to refer to other provisions in the Convention (e.g., Article 21) limiting the carrier's liability.

A further difficulty in applying a sanction in the case of the notice was that tickets were issued in languages which often were not the languages of the passengers. Thus, a lawyer might be able to argue that a ticket issued in a language other than that of the passenger did not contain a sufficient notice. The consequence would be that a large United States International Airline might have to issue tickets in some forty different languages.

Mr. Ambrosini (Italy) said that the Protocol should include a sanction, specifically, a private law sanction. The reason for the sanction was that the passenger ticket, being a fixed-term contract (*contrat d'adhéesion*), the passenger had to accept it without being able to discuss the clauses set out therein. Under these circumstances, the passenger should receive notice, through a clause inserted in the ticket, that there was a limitation of liability, that is, that there was a deviation from the general principle of law that all damage should be fully compensated. For this

reason, Mr. Drion's arguments were not valid. Mr. Drion had asked why the carrier should pay without limitation if the absence of a ticket did not by itself give rise to actual damage. The reply to this question was that the carrier should be subject to unlimited liability because he had violated the principle of public policy to the effect that the passenger should be given notice of the limitation of liability.

With regard to Mr. Cooper's question as to whether the passenger or the carrier had the burden of proof in the case of non-delivery of the passenger ticket, he pointed out that the Rio text, by stating that "if the carrier *accepts* a passenger without a passenger ticket having been delivered" indicated that the carrier had consented to carry the passenger without delivering the passenger ticket. If that were true, then it was altogether normal that it should be up to the passenger to show that the carrier had agreed to carry him without delivering the passenger ticket. Since both the Rio and the United States texts were clear on this point, there was no need to amend them in this regard.

The reason why the absence of the ticket should involve the same sanction as the omission of the notice from a ticket which had been delivered, was that if there were no ticket there would be no notice given to the passenger concerning the limitation of liability.

He noted that the sanction as expressed in the United States text was that the carrier "shall not be entitled to avail himself of any of the defences which *exclude or* limit his liability". He thought it was necessary to delete the words "exclude or", because if the damage were caused by a case of *force majeure*, it would not be equitable for the carrier not to have the right of being free from liability.

His Delegation could accept the Australian proposal if the sanction imposed on the carrier were double the limit of his liability.

Mr. Wilberforce (United Kingdom) referred to the United Kingdom proposal to the effect that the observance of the provisions of Article 3(1) should be ensured by the national law, the text of that proposal reading as follows:

> "Each Contracting State undertakes to adopt measures within its jurisdiction to ensure that the provisions of Article 3(1) are complied with."

This was a practical solution. It had been used in the United Kingdom and in the United States without, as far as he knew, giving rise to policing difficulties.

He was opposed to including the words "exclude or" in the United States text, since the inclusion of the words would seem to deprive the carrier of the defences based upon Article 20 of the Convention, and might even deprive him of all defences of the prescription provisions of the Convention.

He wished the Drafting Committee to consider the words "*accepts* a passenger" found in the Rio text. The word "accepts" was not satisfactory and should be replaced by the word "carries" or some similar word.

Mr. Booth (Canada) was opposed to having a sanction which would impose unlimited liability on the carrier. His Delegation hoped that whatever limits were fixed in the amended Convention would be sufficient to cover completely damage sustained by at least a majority of the air-travelling public. In that event, the failure to give notice would only be of significance to a minority. In the case of that minority the sanction of unlimited liability should only be applicable, in practice, where the passenger was taking his first international flight, since, from then on, that person would be deemed to have had notice of the limitation.

He was not in favour of the German and Israeli proposals. He favoured, as a first choice, the Norwegian proposal. His next choice would be the Australian proposal which provided some limit of liability in the case of the application of a sanction. He was not attracted by the United Kingdom proposal because of the possibility of different treatment being handed out to carriers in different States.

The Conference rejected, by a vote of 25 to 5, the proposal of the Federal Republic of Germany to the effect that there should be no sanctions in Article 3(2) of the Convention.

The Conference rejected, by a vote of 24 to 5, the above-mentioned proposal[1] of the United Kingdom.

The Conference did not vote on an Israeli proposal to the effect that the passenger or consignor who had not been issued with the required document should be given the option to proceed either under the Convention or under the appropriate national law, because this proposal had not been seconded.

The Conference rejected, by a vote of 21 to 11, the proposal of Norway whereby, in the event of a failure to deliver a ticket or in the event of the delivery of a ticket with insufficient statements, the carrier would be liable for the resulting increase of costs and for delay, as provided in Article 19.

Mr. Poulton (Australia) proposed that the words "fifty per cent" be deleted from the Australian text and replaced by the words "one hundred per cent".

The Conference rejected, by a vote of 30 to 2, the proposal of the United States to insert the words "exclude or" before the word "limit" in the last part of Article III(b) of the draft Protocol.

The Conference rejected, by a vote of 19 to 12, the Australian proposal, the text of which is given above[2], as amended by its proposer during the discussion.

The Chairman then proposed to put to vote the text set out in the third sentence of Article III(b) of the draft Protocol.

Mr. Calkins (United States) proposed that the Conference vote on the United States text[3] with the deletion of the words "exclude or".

Mr. Mintz (Israel) said that he could accept the United States proposal if the Drafting Committee would be free to reconsider

1 See I, 132.

2 See I, 129, 130.

3 See II, 243.

the words "to avail himself of any of the defences which limit his liability" and to substitute therefor a more defined text.

Mr. Wilberforce (United Kingdom) repeated his proposal that the Drafting Committee should consider whether the word "accepts", in the first sentence of Article III(b), could be replaced by the word "carries" or some similar word.

Mr. Ambrosini (Italy) said that there was a difference between saying that the carrier "accepted" a passenger and "carried" a passenger. This was a question of substance and not one of drafting. What it was wished to establish was that there was a specific will on the part of the carrier to carry the passenger without delivery of the passenger ticket. The word "accepts" as used in the text, implied consent to perform the carriage. The reason for the use of this word was to exclude the case of the stowaway who might go on board without being noticed by the carrier.

Mr. Wilberforce (United Kingdom) agreed that the paragraph must relate to carriage by consent. He thought that the question of a stowaway would be eliminated, by the use of the word "passenger". A stowaway was not a passenger. He wished to cover the case referred to by Mr. Cooper whereby air carrier might wish to let passengers on to the aircraft and deliver the tickets there. The present wording would prevent this since the passenger ticket would have to be delivered before the passenger was accepted. Under the present text, if a carrier were to issue tickets on the aircraft, he would incur the risk of unlimited liability.

Mr. Cooper (IATA) said, in relation to the United States text, that the word "defences" should be replaced by a specific reference to the "provisions" of certain Article which limited the carrier's liability as to passengers, since the word "defences" might mean contributory negligence among other things.

The President stated that the word "provisions" would be used instead of the word "defences".

The Conference adopted, by a vote of 20 to 11 the United States text, which read as follows:

> "Nevertheless if the carrier accepts the passenger without a passenger ticket having been delivered or if the ticket does not include the statement in the form required by paragraph (1) relating to the applicability of the Convention he shall not be entitled to avail himself of any of the provisions which limit his liability."

In adopting this proposal, the Conference referred to the Drafting Committee the two following points:

a) whether or not the word "accepts" could be replaced by the word "carriers" or some similar word;

b) an Israeli proposal to have the last part of the text read as follows:

> "the limits of liability specified in Article 22(1) of the Convention shall not apply."

(The meeting adjourned at 1800 hours)

EXHIBIT D

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

INTERNATIONAL CONFERENCE

on Private Air Law

The Hague, September 1955

Volume II

DOCUMENTS

September 1956

12. REPORT ON REVISION OF THE WARSAW CONVENTION

(Adopted by the Legal Committee of ICAO at Rio de Janeiro in September 1953)

I. HISTORICAL

1. Since 1935 the question of revising the Warsaw Convention of October 12, 1929, for the unification of certain rules relating to international carriage by air, has engaged the attention of jurists, particularly the Comité International Technique d'Experts Juridiques Aériens (CITEJA), and the International Air Traffic Association. After the second world war, the matter was taken up by the Provisional International Civil Aviation Organization which referred the subject to CITEJA for study. The CITEJA having been dissolved in 1947, the Legal Committee of ICAO undertook to continue the study of the subject. During the years 1948-1951, such study was further developed in the Legal Committee and several draft conventions were formulated by Major K.M. Beaumont, Rapporteur, as a result of discussions in the Committee. These drafts, as well as relevant questionnaires were transmitted to all Contracting States and other interested governments and international organizations. In January 1952, a special sub-committee appointed by the Legal Committee prepared at Paris a complete draft convention to replace the Warsaw Convention. The draft was submitted to the Legal Committee at its Ninth Session.

II. ACTION TAKEN BY THE COMMITTEE AT ITS NINTH SESSION

2. At its initial meeting the Committee considered and discussed the general question as to the desirability of revising the Warsaw Convention and, if such revision was thought desirable, the extent and scope of such revision. It was generally, though not unanimously, agreed that some modifications should be made to the Warsaw Convention in the light of practical difficulties experienced in the application of certain provisions of the Convention and also to remove certain other

difficulties of a legal nature. The majority of the Committee, however, was of the opinion that, having regard to the widespread acceptance of the Warsaw Convention among Contracting and other States, it would not be expedient to replace it by an entirely new one the ratification of which might involve considerable delay; and that, instead, the Convention should be modified to a limited extent to resolve actual difficulties of practical application of its provisions and to bring it into conformity with the developments, economic and polictical, which have taken place during the last quarter of a century. Therefore, while recognizing the unquestionable value of the draft formulated at Paris by its sub-committee and of the preparatory and exploratory work undertaken by its rapporteur, Major K.M. Beaumont, particularly inasmuch as that draft represented a systematic rearrangement, including drafting improvements, of the contents of the Warsaw Convention and included also fresh treatment of certain subjects, the Committee decided that the object of effecting only limited, necessary amendments would be better achieved by taking as the basis of its discussions the Warsaw Convention itself rather than the Paris draft.

3. For convenience, the principal matters discussed by the Committee are treated in the following paragraphs under these heads:—

A. Scope of the Convention
B. Definition of "High Contracting Party" and "Territory"
C. Traffic documents
D. Negotiability of the air waybill (consignment note)
E. Limits of liability
F. Carriage of special cargo
G. Wilful misconduct
H. Liability of servants or agents of the carrier
I. Negligence in navigation
J. Miscellaneous.

This Report indicates the action taken by the Committee on each of these matters and, in general terms, the reason for such action. It must, of course, be appreciated that individual dele-

gations in many cases had stated their own special reasons for the attitude they adopted: these will be recorded in the minutes of the proceedings.

A. *Scope of the Convention*

4. The Convention, under Article 1, applies only to international carriage as there defined which, with one exception, means, in substance, carriage between two States parties to the Convention. The Committee considered certain proposals to extend the definition so as to include also carriage between States neither or only one of which is a party to the Convention. It noted, however, that the Convention was already widely accepted and that certain additional States intended to accede to it, a fact which would render any such extension as suggested of diminishing practical importance. The idea of extending the scope of the Convention received considerable support in the Committee. It was realized, however, that attempts to apply the provisions of the Conventions to carriage to or from States not bound by them would involve certain problems of private international law. Therefore, the Committee ultimately decided to recommend that no change be made in Article 1 of the Convention in regard to the scope of the Convention.

B. *Definition of "High Contracting Party" and "Territory"*

5. In Article 1 of the Convention, however, two other problems required action. First, the Convention uses the expression "High Contracting Parties" to describe not only States which have ratified or adhered to the Convention but also those which were original signatories of the Convention but have not ratified it. Secondly, the Convention was concluded between High Contracting Parties (Heads of States) in respect of their "territories", which expression (see Articles 1 and 40) was intended to signify all territories subject to the sovereignty, suzerainty, mandate or authority of a High Contracting Party. As a result of political developments since 1929, however, certain countries which were then included in the territories of the High Contracting Parties enumerated in the Preamble to the Convention have since attained independent international status. Further,

the implied definition of "territory" as mentioned above does not (and in 1929 could not) include territories subject to trusteeship. The Committee considered that the problems relating to "High Contracting Party" and "territory" would be resolved by adding a new article to the Convention defining these expressions (see Article XVII of the draft Protocol recommended by the Committee).

C. *Traffic documents*

6. Chapter II of the Warsaw Convention, in Articles 3 to 11, specifies requirements in great detail, particularly in Article 8, in regard to the contents of passenger tickets, baggage tickets and air waybills (consignment notes). Non-delivery of tickets or air waybills (consignment notes) or the omission of certain particulars therefrom entails the penalty of the carrier being deprived of defences and the limitation of liability. Inasmuch as air carriers experience difficulties in complying in every particular with these detailed requirements, and as such requirements are not sometimes fulfilled in the circumstances inseparable from speedy arrangements for air transportation, the Committee considered it to be expedient and also necessary that there should be a simplification of traffic documents required by the Convention. It was further considered to be undesirable that the requirements as to these matters should be defined in a convention: such international agreement as to the form of traffic documents as is needed should, in the view of the Committee, be reached by other methods which admit of more flexible adjustment to changing demands. Therefore, the Committee recommends that the Convention should lay down obligatory requirements only in two respects, namely that such documents should contain such particulars as would demonstrate that the carriage involved is international carriage within the meaning of the Convention and, secondly, that there should be a statement to the effect that the carriage is subject to the provisions of the Convention: the latter statement is required in order to bring to the notice of passengers that the Convention applies. If there is failure to comply with either of these two requirements, the carrier shall not be entitled to avail himself of any provisions which

limit his liability in respect of the passenger, registered baggage or cargo, as the case may be (see Articles III to IX of the draft Protocol).

7. The draft Protocol also contains provisions in respect of the passenger ticket and the baggage check similar to those already existing (in Article 11 of the Convention) in respect of the air waybill (consignment note) insofar as all these traffic documents would constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. In addition, they would, in the case of registered baggage, constitute *prima facie* evidence in respect of their registration. Certain practical considerations also indicate the need for changes in the text of the Convention in so far as it relates to the requirement that the passenger ticket and the baggage check shall be delivered by the carrier (without making allowance for the common practice of such acts to be performed by travel agents on behalf of the carrier): this matter is taken care of in the proposed re-wording of Articles 3(1) and 4(1) of the Convention. The wording suggested in relation to the delivery of tickets is also such as to permit of the delivery of family or group tickets. Further, an amendment of Article 6 of the Convention was considered necessary to enable the carrier to "accept" cargo for consignment without delivering immediately the air waybill (consignment note), since the practice in air transportation is that such air waybills (notes) are made out at appropriate offices of the carrier situated at a distance from the several places where cargo is accepted for air carriage.

8. A minor change of a legal character was also made in Article 10(2) relating to the liability of the consignor. It is now provided that the consignor shall be liable for all damage suffered by the carrier, or any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars or statements in the air waybill (consignment note). The qualifying words "to whom the carrier is liable" are an addition to the Warsaw text.

D. *Negotiability of the air waybill (consignment note)*

9. The Committee also considered the question of negotiability of the air waybill (consignment note). It, however, considered that work on the subject was not sufficiently advanced and that sufficient demand for the insertion of provisions relating to this matter had not yet been brought to the notice of the Committee to justify a recommendation that provisions relating to negotiability should be included in the draft Protcool. It therefore adopted a resolution that the matter be kept under separate study.

E. *Limits of liability*

10. An important aspect considered in relation to the question of revision of the Warsaw Convention was the economic one relating to the carrier's maximum liability in respect of the carriage of passengers (Article 22 of the Convention). In certain parts of the world, particularly the North American Continent, judicial awards of compensation for damage suffered by passengers, arising out of air carriage not governed by the Warsaw Convention, are often much higher than the maximum amount prescribed in Article 22 of the Convention. Consequently, views were expressed in the Committee that the existing limits of liability under the Convention should be increased. Another argument in support of this view was that the record of air safety had vastly improved since 1929 and therefore the carrier is now involved in lower risks than those prevailing in the earlier days of air transportation development, and consequently should be prepared to pay higher amounts on the fewer occasions of accidents. It was argued also that the cost of an increase, reflected in the additional insurance premiums payable, in relation to the cost of air transport generally, was small. On the other hand, some members of the Legal Committee stated that their governments considered the existing maximum limits of the Warsaw Convention to be satisfactory. The Committee also noted the study made by the Air Transport Committee of ICAO on the subject of limits of liability. The latter Committee was of the view that the value of the Poincaré franc specified in the Warsaw Convention is at present higher in certain parts of the

world, although it is somewhat lower in others, than in 1929. Before the Legal Committee, it was urged that the objective of an international convention intended to be applicable to all parts of the world must take into account the different economic and monetary conditions in different countries; also that the objective of such a convention should be to meet the average requirements of the average class of passenger using international air transport. If any passenger desired higher protection, he could, at very little cost, obtain insurance to cover related risks of air transport. Moreover, the requirements of such passenger should not in effect be subsidized by the average passenger who, if the limits of liability in the Convention were fixed at a high figure, would have to pay a higher fare (which would include a higher rate of premium paid by the carrier to the insurer in respect of passengers generally).

11. After a detailed study, the Air Transport Committee had come to the conclusion that a limited increase, namely up to 50% of the existing limits of liability specified in the Convention, would be justified in respect of death or injury to passengers and that in any case the present limits in respect of non-fatal injuries ought to be increased. On the other hand, with respect to baggage and cargo, that Committee was of the opinion that there was no necessity to alter the limits of the Warsaw Convention. Before the Legal Committee, no proposals were made for any increase in respect of baggage and cargo. But in respect of passengers there were several proposals for increase, the largest being for increasing the existing limit by 200%. Another proposal was that the present limit should be increased by 50% but that there should be another limit which should be applied against the carrier in certain circumstances (see letter (b) in paragraph 16), and that the second limit should be double the first. By a vote of 16 to 9, the Legal Committee decided that it would be appropriate to increase, in respect of passengers, the limit of liability specified in paragraph 1 of Article 22 of the Warsaw Convention by 50% (which would have had the effect of substituting 187,500 gold francs in place of 125,000 gold francs); but, in order to achieve a rational and acceptable round figure of liability, the Committee subsequently

decided by 15 votes to 8 that the existing limit of 125,000 gold francs should be increased to 200,000 gold francs (representing an increase of 60%). The latter decision is embodied in Article XI of the draft Protocol.

12. A related matter considered by the Committee was the conversion of the gold franc into national currencies. For this purpose the Committee decided to recommend adoption of the same formula as was embodied on this subject in the Convention relating to damage caused by foreign aircraft to third parties on the surface opened for signature at Rome on 7 October 1952 (see Article XI(c) of the draft Protocol).

13. An amendment which practical considerations indicated to be necessary was one concerning cases of loss, damage or delay of a part of registered baggage or cargo or of an article therein contained. A lacuna in this respect in the Warsaw Convention is to be filled by the insertion of a new provision numbered paragraph (2) in Article 22 of the Warsaw Convention (see Article XI(b) of the draft Protocol).

F. *Carriage of special cargo*

14. A difficulty experienced in actual practice was the absence of a provision in the Convention which would enable an air carrier to make special stipulations in regard to the risks of carrying cargo of special characteristics, such as live animals or goods suffering natural deterioration during carriage by air. A provision in this respect based upon analogous provisions of maritime law has therefore been proposed to be added to Article 23 of the Warsaw Convention (Article XII of the draft Protocol).

G. *Wilful misconduct (''dol'')*

15. According to Article 25(1) of the Warsaw Convention, the carrier cannot invoke the provisions of the Convention which exclude or limit his liability if the damage is caused by ''dol'' or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to ''dol''. The article has been much criticized. The Convention, being in French, uses the expression ''dol''. The

nearest equivalent to this in English has been regarded as "wilful misconduct", but even this concept does not completely coincide with the conception of "dol". Secondly, the expression 'default . . . equivalent to 'dol' " has been regarded as intended to cover cases of "faute lourde", but there is no corresponding concept of this in the Anglo-Saxon legal system where, consequently, attempts have been made either to conceive of it as "*gross* negligence", a concept foreign to English civil law, or to disregard altogether that part of Article 25(1) which refers to "default . . . equivalent to 'dol' ". Further, even in courts on the Continent, there has been no uniform interpretation of what constitutes "faute lourde". In any case, the provision of the article which leaves to different courts in different jurisdictions the function of defining what default is to be "considered to be equilvalent to 'dol' " carries the risk of conflicting interpretations on this point: and this is contrary to the objective of the Convention which is to ensure uniformity of rules on the subject. From the practical point of view these defects are of importance because of the tendency of claimants to evade the provisions of Article 22(1) and to attempt to benefit from the present imprecision of Article 25(1). Therefore, there was general agreement in the Committee that the article should be revised.

16. At an early stage of the session it was suggested that the question of limit (in Article 22) and that of cases in which no limit would apply (Article 25) should be considered together: a view expressed in this connection was that if some benefit was to be conferred on the passenger by raising the limit, a corresponding balance should appear in Article 25 in order that the carrier may be protected against litigation which is now possible because of the ambiguity of the present text of the article. One proposal in this connection was characterized by a suggestion of having two limits. The proposal was that—

(a) where the carrier fails to prove that he and his agents have taken all necessary measures to avoid the damage or that it was impossible to take them (Article 20(1)), the claim shall be subject to a specified limit which, specifically in relation to this entire proposal, was at one stage proposed to be raised from 125,000 gold francs by 50% and later by 100%;

(b) this limit would be doubled in cases where it is proved that the damage was caused by an act committed recklessly, not caring whether or not damage was likely to result; and

(c) where, however, the person suffering damage proved that it was caused by a deliberate act of the carrier, his servants or agents, done with intent to cause damage (unless with the object of avoiding greater damage), the liability shall not be subject to any limit.

The Committee, however, decided not to link, for the purpose of voting, the question of the limit of liability and that of the revision of Article 25. Therefore it determined first the question of the limit of liability (part (a) of the above proposal) and later rejected the rest of the proposal for amendment of Article 25 (3 votes for and 9 votes against).

17. The following proposals also were considered with regard to the revision of Article 25:

A. To substitute, for Article 25(1) and (2), the following:—

"The carrier shall be liable without limitation if the claimant proves:

(a) that the damage is caused by an act or omission of the carrier or of his servant or an agent of the carrier in the course of his employment; and

(b) that such act or omission was committed either with the intention to cause damage or recklessly by not caring whether or not damage was likely to result."

B. To delete from Article 25 the words "or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct".

C. To substitute for paragraphs (1) and (2) of Article 25 the following:—

> "The limits of liability specified in Article 22 of this Convention shall not apply if it is proved that the damage resulted from a deliberate act or omission of the carrier, his servants or agents done with intent to cause damage; provided that, in the case of a deliberate act or omission of a servant or agent it is also proved that he was acting within the scope of his employment."

Of these proposals the last mentioned was adopted by the Committee after a rollcall vote, by 12 votes to 11 with 2 abstentions, subject to drafting changes. The only drafting change ultimately made was to substitute the words "in the course of his employment" for the words "within the scope of his employment". Thus, the Committee ultimately revised Article 25 of the Warsaw Convention almost in the same manner as this subject was determined in Article 12 of the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface which was opened for signature at Rome on 7 October 1952.

H. *Liability of servants or agents of the carrier*

18. In spite of provisions in the Warsaw Convention limiting the liability of the carrier (except in certain cases), the existing text would not preclude the possibility that efforts might be made by claimants to obtain from the carrier higher damages than those specified in the Convention by filing actions against the servant or agent of the carrier, upon the basis that no provision existed in the Convention limiting the liability of the servant or agent and upon the assumption that the carrier would indemnify such servant or agent. In order that the carrier may be protected against this kind of litigation and in order to protect the servants and agents of carriers, a new provision, Article 25A, as specified in Article XIV of the draft Protocol, has been recommended. It may be noted that provisions to a like effect exist in the Rome Convention of 1952 referred to above.

I. *Negligence in navigation*

19. Article 20, paragraph 2 of the Convention provides that in the carriage of cargo and baggage the carrier is not liable if he proves that the damage was caused by negligence in pilotage or navigation or handling of the aircraft. The Committee considered that it would be illogical to maintain that provision since it embodies a rule so completely different from that governing the carrier's liability in respect of passengers.

J. *Miscellaneous*

20. The Committee also recommended—

(a) that the provisions of paragraph (2) of Article 2 of the Convention relating to exclusion from the scope of the Convention of carriage undertaken for postal authorities should be revised in the manner specified in Article II of the draft Protocol;

(b) that the word "days" used in Article 35 of the Convention should be redefined in the manner proposed in Article XVI of the draft Protocol;

(c) that the provision in Article 34 of the Convention, which excludes from its scope carriage performed by way of experimental trial, should be eliminated, in view of the advanced state which air transport has attained, and that the Article should exclude from the Convention only carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

21. At the final meeting, mention was made of the problem which would arise from the coexistence of two systems, namely the Warsaw Convention as modified by the proposed Protocol, and the Warsaw Convention alone. In this connection the following proposal was made:—

> "This Protocol shall apply to transportation as defined in Article 1 of the Convention, provided the points of departure and destination referred to therein shall be situated in the territory of a party or two parties to this Protocol".

No decision, however, was taken on the subject.

The Committee considered that the procedural provisions in the draft Protocol, including one relating to the number of ratifications necessary to bring the Protocol into effect, would best be determined in the proposed conference. The Committee, however, was of the view that the Protocol should not come into force unless a substantial proportion of the States parties to the Warsaw Convention ratified the Protocol.

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No. 6943

FEDERAL REPUBLIC OF GERMANY, BELGIUM, BRAZIL, EGYPT, FRANCE, etc.

Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929. Done at The Hague, on 28 September 1955

Official texts: French, English and Spanish.

Registered by Poland on 30 September 1963.

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE, BELGIQUE, BRÉSIL, ÉGYPTE, FRANCE, etc.

Protocole portant modification de la Convention pour l'unification de certaines règles relatives au transport aérien international signée à Varsovie le 12 octobre 1929. Fait à La Haye, le 28 septembre 1955

Textes officiels: française, anglais et espagnol.

Enregistré par la Pologne le 30 septembre 1963.

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No. 6943. PROTOCOLE[1] PORTANT MODIFICATION DE LA CONVENTION POUR L'UNIFICATION DE CERTAINES RÈGLES RELATIVES AU TRANSPORT AÉRIEN INTERNATIONAL SIGNÉE À VARSOVIE LE 12 OCTOBRE 1929[2]. FAIT À LA HAYE, LE 28 SEPTEMBRE 1955

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1 Entré en vigueur le 1er août 1963, le quatre-vingt-dixième jour après le dépôt du trentième instrument de ratification, conformément au paragraphe 1 de l'article XXII. Les instruments de ratification ont été déposés auprès du Gouvernement de la République populaire de Pologne aux dates suivantes:

Pologne	23	avril	1956
Égypte	26	avril	1956
Laos	9	mai	1956
El Salvador	17	septembre	1956
Luxembourg	13	février	1957
Union des Républiques socialistes soviétiques	25	mars	1957
Mexique	24	mai	1957
Hongrie	4	octobre	1957
Tchécoslovaquie	23	novembre	1957
Roumanie	3	décembre	1958
Yougoslavie	16	avril	1959
République démocratique allemande	19	mai	1959
France	19	mai	1959
Australie	23	juin	1959
Irlande	12	octobre	1959
République socialiste soviétique d'Ukraine	23	juin	1960
Venezuela	26	août	1960
Pays-Bas	21	septembre	1960
République fédérale d'Allemagne	27	octobre	1960
Pakistan	16	janvier	1961
République socialiste soviétique de Biélorussie	17	janvier	1961
Cameroun*	21	août	1961
Congo (Brazzaville)*	5	janvier	1962
Dahomey*	9	janvier	1962
Côte-d'Ivoire*	2	février	1962
Niger*	20	février	1962
Madagascar*	17	août	1962
Suisse	19	octobre	1962

* États qui se sont déclarés liés par la ratification de la France.

No. 6943. PROTOCOL[1] TO AMEND THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR SIGNED AT WARSAW ON 12 OCTOBER 29.[2] DONE AT THE HAGUE, ON 28 SEPTEMBER 1955

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1 Came into force on 1 August 1963, the ninetieth day after the deposit of the thirtieth instrument of ratification, in accordance with article XXII. The instruments of ratification were deposited with the Government of the Polish People's Republic as follows:

Poland	23	April	1956
Egypt	26	April	1956
Laos	9	May	1956
El Salvador	17	September	1956
Luxembourg	13	February	1957
Union of Soviet Socialist Republics	25	March	1957
Mexico	24	May	1957
Hungary	4	October	1957
Czechoslovakia	23	November	1957
Romania	3	December	1958
Yugoslavia	16	April	1959
German Democratic Republic	19	May	1959
France	19	May	1959
Australia	23	June	1959
Ireland	12	October	1959
Ukrainian Soviet Socialist Republic	23	June	1960
Venezuela	26	August	1960
Netherlands	21	September	1960
Federal Repulic of Germany	27	October	1960
Pakistan	16	January	1961
Byelorussian Soviet Socialist Republic	17	January	1961
Cameroon*	21	August	1961
Congo (Brazzaville)*	5	January	1962
Dahomey*	9	January	1962
Ivory Coast*	2	February	1962
Niger*	20	February	1962
Madagascar*	17	August	1962
Switzerland	19	October	1962

* States which declared themselves bound by the ratification of France.

Les Gouvernements sous-signés

CONSIDÉRANT qu'il est souhaitable d'amender la Convention pour l'unification de certaines règles relatives au transport aérien international signée à Varsovie le 12 octobre 1929.[2]

SONT CONVENUS de ce qui suit:

CHAPITRE PREMIER

AMENDEMENTS À LA CONVENTION

Article premier

À l'article premier de la Convention—

a) l'alinéa 2 est supprimé et remplacé par la disposition suivante:

"2. Est qualifié *transport international*, au sens de la présente Convention, tout transport dans lequel, d'aprés les stipulations des parties, le point de départ et le point de desination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes soit sur le territoire d'une seule Haute Partie Contractante si une escale est prévue sur le territoire d'un autre État, même si cet État n'est pas une Haute Partie Contractante. Le transport sans une telle escale entre deux points du territoire d'une seule Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention."

Danemark	3 mai	1963
Islande	3 mai	1963
Norvège	3 mai	1963
Suède	3 mai	1963
Italie	4 mai	1963

2 Société des Nations, *Recueil des Traités*, vol. CXXXVII, p. 11; vol. CXLII, p. 393; vol. CXLVII, p. 355; vol. CLVI, p. 258; vol. CLX, p. 418; vol. CLXIV, p. 395; vol. CLXXII, p. 245; vol. CLXXVII, p. 420; vol. CLXXXI, p. 397; vol. CLXXXV, p. 406; vol. CXCIII, p. 273; vol. CXCVI, p. 422; et Nations Unies, *Recueil des Traités*, vol 261, p. 243, et vol. 266, p. 444.

The Governments undersigned

CONSIDERING that it is desirable to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929,[2]

HAVE AGREED as follows:

CHAPTER I

AMENDMENTS TO THE CONVENTION

Article I

In Article 1 of the Convention—

a) paragraph 2 shall be deleted and replaced by the following:

"2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention."

Denmark	3 May	1963
Iceland	3 May	1963
Norway	3 May	1963
Sweden	3 May	1963
Italy	4 May	1963

2 League of Nations, *Treaty Series*, Vol. CXXXVII, p. 11; Vol. CXLII, p. 393; Vol. CXLVII, p. 355; Vol. CLVI, p. 258; Vol. CLX, p. 418; Vol. CLXIV, p. 395; Vol. CLXXII, p. 425; Vol. CLXXVII, p. 420; Vol. CLXXXI, p. 397; Vol. CLXXXV, p. 406; Vol. CXCIII, p. 273; Vol. CXCVI, p. 422; and United Nations, *Treaty Series*, Vol. 261, p. 423, and Vol. 266, p. 444.

b) l'alinéa 3 est supprimé et remplacé par la disposition suivante:

"3. Le transport à exécuter par plusieurs transporteurs par air successifs est censé constituer pour l'application de la présente Convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats, et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans le territoire d'un même État."

Article II

À l'article 2 de la Convention—

l'alinéa 2 est supprimé et remplacé par la disposition suivante:

"2. La présente Convention ne s'applique pas au transport du courrier et des colis postaux."

Article III

À l'article 3 de la Convention—

a) l'alinéa 1er est supprimé et remplacé par la disposition suivante:

"1. Dans le transport de passagers, un billet de passage doit être délivré, contenant:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'une même Haute Partie Contractante et qu'une ou plusieurs escales soient prévues sur le territoire d'un autre État, l'indication d'une de ces escales;

c) un avis indiquant que si les passagers entreprennent un voyage comportant une destination finale ou une escale dans un pays autre que le pays de départ, leur transport peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité du transporteur en cas de mort ou de lésion corporelle, ainsi qu'en cas de perte ou d'avarie des bagages."

b) paragraph 3 shall be deleted and replaced by the following:

"3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State."

Article II

In Article 2 of the Convention—

paragraph 2 shall be deleted and replaced by the following:

"2. This Convention shall not apply to carriage of mail and postal packages."

Article III

In Article 3 of the Convention—

a) paragraph 1 shall be deleted and replaced by the following:

"1. In respect of the carriage of passengers a ticket shall be delivered containing:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

b) l'aninéa 2 est supprimé et remplacé par la disposition suivante:

"2. Le billet de passage fiat foi, jusqu'à preuve contraire, de la conclusion et des conditions du contrat de transport. L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois, si, du consentement du transporteur, le passager s'embarque sans qu'un billet de passage ait été délivré, ou si le billet ne comporte pas l'avis prescrit à l'alinéa 1 *c*) du présent article, le transporteur n'aura pas le droit de se prévaloir des dispositions de l'article 22."

Article IV

À l'article 4 de la Convention—

a) les alinéas 1, 2 et 3 sont supprimés et remplacés par la disposition suivante:

"1. Dans le transport de bagages enregistrés, un bulletin de bagages doit être délivré qui, s'il n'est pas combiné avec un billet de passage conforme aux dispositions de l'article 3, alinéa 1er, ou n'est pas inclus dans un tel billet, doit contenir:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination soint situés sur le territoire d'une même Haute Partie Contractante et qu'une ou plusieurs escales soient prévues sur le territoire d'un autre État, l'indication d'une de ces escales;

c) un avis indiquant que, si le transport comporte une destination finale ou une escale dans un pays autre que le pays de départ, il peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité du transporteur en cas de perte ou d'avarie des bagages."

b) paragraph 2 shall be deleted and replaced by the following:

"2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 *c*) of this Article, the carrier shall not be entitled to avail himself of the provision of Article 22."

Article IV

In Article 4 of the Convention—

a) paragraphs 1, 2 and 3 shall be deleted and replaced by the following:

"1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that; if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss or damage to baggage."

b) l'alinéa 4 est supprimé et remplacé par la disposition suivante:

"2. Le bulletin de bagages fait foi, jusqu'à preuve contraire, de l'enregistrement des bagages et des conditions du contrat de transport. L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutfois, si le transporteur accepte la garde des bagages sans qu'un bulletin ait été délivré ou si, sans le cas où le bulletin n'est past combiné avec un billet de passage conforme aux dispositions de l'article 3, alinéa 1 *c*), ou n'est pas inclus dans un tel billet, il ne comporte pas l'avis prescrit à l'alinéa 1 *c*) du présent article, le transporteur n'aura pas le droit de prévaloir des dispositions de l'article 22, alinéa 2."

Article V

À l'article 6 de la Convention—

l'alinéa 3 est supprimé et remplacé par la disposition suivante:

"3. La signature du transporteur doit être apposée avant l'embarquement de la marchandise à bord de l'aéronef."

Article VI

L'article 8 de la Convention est supprimé et remplacé par la disposition suivante:

"La lettre de transport aérien doit contenir:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'une même Haute Partie Contractante et qu'une ou plusieurs escales soient prévues sur la territoire d'une autre État, l'indication d'une de ces escales;

b) paragraph 4 shall be deleted and replaced by the following:

"2. The baggage check shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1 *c*)) does not include the notice required by paragraph 1 *c*) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2."

Article V

In Article 6 of the Convention—

paragraph 3 shall be deleted and replaced by the following:

"3. The carrier shall sign prior to the loading of the cargo on board the aircraft."

Article VI

Article 8 of the Convention shall be deleted and replaced by the following:

"The air waybill shall contain:

a) an indication of the places of departure and destination:

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) un avis indiquant aux expéditeurs que, si le transport comporte une destination finale ou une escale dans un pays autre que le pays de départ, il peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité ds transporteurs en cas de perte ou d'avarie des marchandises.''

Article VII

L'article 9 de la Convention est supprimé et remplacé par la dispositions suivante:

''Si, du consentement du transportuer, des marchandises sont embarquées à bord de l'aéronef sans qu'une lettre de transport aérien ait été établie ou si celle-ci ne comporte pas l'avis prescrit à l'article 8, alinéa *c*) le transporteur n'aura pas le droit de se prévaloir des dispositions de l'article 22, alinéa 2.''

Article VIII

À l'article 10 de la Convention—

l'alinéa 2 est supprimé et remplacé par la disposition suivante:

''2. Il supportera la responsabilité de tout dommage subi par la transporteur ou par toute autre personne à l'égard de laquelle la responsabilité du transporteur est engagée à raison de ses indications et déclarations irrégulières, inexactes ou incomplètes.''

Article IX

À l'article 15 de la Convention—

l'alinéa suivant est inséré:

''3. Rien dans la présente Convention n'empêche l'établissement d'une lettre de transport aérien négociable.''

Article X

L'alinéa 2 de l'article 20 de la Convention est supprimé.

c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo.''

Article VII

Article 9 of the Convention shall be deleted and replaced by the following:

''If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph *c*), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.''

Article VIII

In Article 10 of the Convention—

paragraph 2 shall be deleted and replaced by the following:

''2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor.''

Article IX

To Article 15 of the Convention—

the following paragraph shall be added:

''3. Nothing in this Convention prevents the issue of a negotiable air waybill.''

Article X

Paragraph 2 of Article 20 of the Convention shall be deleted.

Article XI

L'article 22 de la Convention est supprimé et remplacé par les dispositions suivantes:

"Article 22

1. Dans le transport des personnes, la responsabilité du transporteur relative à chaque passager est limitée à la somme de deux cent cinquante mille francs. Dans le cas où, d'après la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le passager pourra fixer une limite de responsabilité plus élevée.

2. *a*) Dans le transport de bagages enregistrés et de marchandises, la responsabilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

b) En cas de perte, d'avarie ou de retard d'une partie des bagages enrigestrés ou des marchandises, ou de tout objet qui y est contenu, seul le poids total du ou des colis dont il s'agit est pris en considération pour déterminer la limite de responsabilité du transporteur. Toutefois, lorsque la perte, l'avarie ou le retard d'une partie des bagages enregistrés ou des marchandises, ou d'un object qui y est contenu, affecte la valeur d'autres colis couverts par le même bulletin de bagages ou la même lettre de transport aérien, le poids total de ces colis doit être pris en considération pour déterminer la limite de responsabilité.

Article XI

Article 22 of the Convention shall be deleted and replaced by the following:

"Article 22

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

2. *a*) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. En ce qui concerne les objets dont le passager conserve la garde, la responsabilité du transporteur est limitée à cinq mille francs par passager.

4. Les limites fixées par le présent article n'ont pas pour effet d'enlever au tribunal la faculté d'allouer en outre, conformément à sa loi, une somme correspondant à tout ou partie des dépens et autres frais du procès exposés par le demandeur. La disposition précédente ne s'applique pas lorsque le montant de l'indemnité allouée, non compris les dépens et autres frais de procès, ne dépasse pas la somme que le transporteur a offerte par écrit au demandeur dans un délai de six mois à dater du fait qui a causé le dommage ou avant l'introduction de l'instance si celle-ci est postérieure à ce délai.

5. Les sommes indiquées en francs dans le présent article sont considérées comme sa rapportant à une unité monétaire constituée par soixante-cinq milligrammes et demi d'or au titre de neuf cents millièmes de fin. Ces sommes peuvent être converties dans chaque monnaie nationale en chiffres ronds. La conversation de ces sommes en monnaies nationales autres que la monnaie-or s'affectuera en cas d'instance judiciaire suivant la valeur-or de ces monnaies à la date du jugement."

Article XII

À l'article 23 de la Convention, la disposition actuelle devient l'alinéa 1er, et l'alinéa 2 suivant est ajouté:

"2. L'alinéa 1er du présent article ne s'applique pas aux clauses concernant la perte ou le dommage résultant de la nature ou du vice propre des marchandises transportées."

Article XIII

A l'article 25 de la Convention—

les alinéas 1 et 2 sont supprimés et remplacés par la disposition suivante:

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger.

4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of a sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of judgment."

Article XII

In Article 23 of the Convention, the existing provision shall be numbered as paragraph 1 and another paragraph shall be added as follows:

"2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."

Article XIII

In Article 25 of the Convention—

paragraphs 1 and 2 shall be deleted and replaced by the following:

"Les limites de responsabilité prévues à l'article 22 ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une ommission du transporteur ou de ses préposés fait, soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement, pour autant que, dans le cas d'un acte ou d'une omission de préposés, la prevué soit également apportée que ceux-ci ont agi dans l'exercice de leur fonctions."

Article XIV

Après l'article 25 de la Convention, l'article suivant est inséré:

"Article 25 A

1. Si une action est intentée contre un préposé du transporteur à la suite d'un dommage visé par la présente Convention, ce préposé, s'il prouve qu'il a agi dans l'exercise de ses fonctions, pourra se prévaloir des limites de responsabilité que peut invoquer ce transporteur en vertu de l'article 22.

2. Le montant total de la réparation qui, dans ce cas, peut être obtenu du transporteur et de ses préposés ne doit pas dépasser lesdites limites.

3. Les dispositions des alinéas 1 et 2 du présent article ne s'appliquent pas s'il prouvé que le dommage résulte d'un acte ou d'une omission du préposé fait, soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement."

Article XV

À l'article 26 de la Convention—

l'alinéa 2 est supprimé et remplacé par la disposition suivante:

"The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such an act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

Article XIV

After Article 25 of the Convention, the following article shall be inserted:

"Article 25 A

1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

Article XV

In Article 26 of the Convention—

paragraph 2 shall be deleted and replaced by the following:

"2. En cas d'avarie, le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de sept jours pour les bagages et de quatorze jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra êtra faite au plus tard dans les vingt et un jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition."

Article XVI

L'article 34 de la Convention est supprimé et remplacé par la disposition suivante:

"Les dispositions des articles 3 à 9 inclus relatives aux titres de transport ne sont pas applicables au transport effectué dans des circonstances extraordinaires en dehors de tout opération normale de l'exploitation aérienne."

Article XVII

Après l'article 40 de la Convention, l'article suivante est inséré:

"Article 40 A

1. À l'article 37, alinéa 2 et à l'article 40, alinéa 1er, l'expression *Haute Partie Contractante* signifié *État*. Dans tous les autres cas, l'expression *Haute Partie Contractante* signifie un État dont la ratification ou l'adhésion à la Convention a pris effet et dont la dénonciation n'a pas pris effet.

2. Aux fins de la Convention, le mot *territoire* signifie non seulement le territoire métropolitain d'un État, mais aussi tous les territoires qu'il représente dans les relations extérieures."

"2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal."

Article XVI

Article 34 of the Convention shall be deleted and replaced by the following:

"The provisions of Articles 3 to 9 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business."

Article XVII

After Article 40 of the Convention, the following Article shall be inserted:

"Article 40 A

1. In Article 37, paragraph 2 and Article 40, paragraph 1, the expression *High Contracting Party* shall mean *State*. In all other cases, the expression *High Contracting Party* shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

2. For the purposes of the Convention the word *territory* means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible."

CHAPITRE II

CHAMP D'APPLICATION DE LA CONVENTION AMENDÉE

Article XVIII

La Convention amendée par le présent protocole s'applique au transport international défini à l'article premier de la Convention lorsque les points de départ et de destination sont situés soit sur le territoire de deux États parties au présent protocole, soit sur le territoire d'un seul État partie au présent protocole si une escale est prévue dans le territoire d'un autre État.

CHAPITRE III

DISPOSITIONS PROTOCOLAIRES

Article XIX

Entre les Parties au présent Protocole, la Convention et le Protocole seront considérés et interprétés comme un seul et même instrument et seront dénommés *Convention de Varsovie amendée à la Haye en 1955*.

Article XX

Jusqu'à sa date d'entrée en vigeur conformément aux dispositions de l'article XXII, alinéa 1er, le présent Protocole restera ouvert à la signature à tout État qui aura ratifié la Convention ou y aura adhéré, ainsi qu'à tout État ayant participé à la Conférence à laquelle ce Protocole a été adopte.

Article XXI

1. Le présent Protocole sera soumis à la ratification des États signataires.

2. La ratification du présent Protocole par un État qui n'est pas partie à la Convention emporte adhésion à la Convention amendée par ce Protocole.

CHAPTER II

SCOPE OF APPLICATION OF THE CONVENTION AS AMENDED

Article XVIII

The Convention as amended by this Protocol shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two parties to this Protocol or within the territory of a single party to this Protocol with an agreed stopping place within the territory of another State.

CHAPTER III

FINAL CLAUSES

Article XIX

As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955*.

Article XX

Until the date on which this Protocol comes into force in accordance with the provisions of Article XXII, paragraph 1, it shall remain open for signature on behalf of any State which up to that date has ratified or adhered to the Convention or which has participated in the Conference at which this Protocol was adopted.

Article XXI

1. This Protocol shall be subject to ratification by the signatory States.

2. Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

3. Les instruments de ratification seront déposés auprès du Gouvernement de la République Populaire de Pologne.

Article XXII

1. Lorsque le présent Protocole aura réuni les ratifications de trente États signataires, il entrera en vigure entre ces États le quatre-vingt-dixième jour après le dépôt du trentième instrument de ratification. À l'égard de chaque État qui le ratifiera par la suite, il entrera en vigueur le quatre-vingt-dixième jour après le dépôt de son instrument de ratification.

2. Dès son entrée en vigeur, le présent Protocole sera enregistré auprès de l'Organisation des Nations Unies par le Gouvernement de la République Populaire de Pologne.

Article XXIII

1. Après son entrée en vigeur, le présent Protocole sera ouvert à l'adhésion de tout État non signataire.

2. L'adhésion au présent Protocole par un État qui n'est pas partie à la Convention emporte adhésion à la Convention amendée par le présent Protocole.

3. L'adhésion sera effectuée par le dépôt d'un instrument d'adhésion auprès du Gouvernement de la République Populaire de Pologne et produira ses effets le quatre-vingt-dixième jour après ce dépôt.

Article XXIV

1. Toute Partie au présent Protocole pourra le dénoncer par une notification faite au Gouvernement de la Républiqe Populaire de Pologne.

2. La dénonciation produira ses effets six mois après la date de réception par le Gouvernement de la République Populaire de Pologne de la notification de dénonciation.

3. Entre les parties au présent Protocole, la dénonciation de la Convention par l'une d'elles en vertu de l'article 39 ne doit pas être interprétée comme une dénonciation de la Convention amendée par le présent Protocole.

3. The instruments of ratification shall be deposited with the Government of the People's Republic of Poland.

Article XXII

1. As soon as thirty signatory States have deposited their instruments of ratification of this Protocol, it shall come into force between them on the ninetieth day after the deposit of the thirtieth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Protocol comes into force it shall be registered with the United Nations by the Government of the People's Republic of Poland.

Article XXIII

1. This Protocol shall, after it has come into force, be open for adherence by any non-signatory State.

2. Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

3. Adherence shall be effected by the deposit of an instrument of adherence with the Government of the People's Republic of Poland and shall take effect on the ninetieth day after the deposit.

Article XXIV

1. Any Party to this Protocol may denounce the Protocol by notification addressed to the Government of the People's Republic of Poland.

2. Denunciation shall take effect six months after the date of receipt by the Government of the People's Republic of Poland of the notification of denunciation.

3. As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 39 thereof shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

Article XXV

1. Le présent Protocole s'appliquera à tous les territoires qu'un État partie à ce Protocole représente dans les relations extérieures, à l'exception des territoires à l'égard desquels une déclaration a été fait conformément a l'alinéa 2 du présent article.

2. Tout État pourra, au moment du dépôt de son instrument de ratification ou d'adhésion, déclarer que son acceptation du présent Protocole ne vise pas un ou plusiers des territoires qu'il représente dans les relations extérieures.

3. Tout État pourra par la suite notifier au Gouvernement de la République Populaire de Pologne que le présent Protocole s'appliquera à un ou plusieurs des territoires ayant fait l'objet de la déclaration prévue à l'alinéa 2 du présent article. Cette notification produira ses effets le quatre-vingt-dixième jour après la date de sa réception par ce Gouvernement.

4. Tout État partie a ce Protocole pourra, conformément aux dispositions de l'article XXIV, alinéa 1[er], dénoncer le présent Protocole séparément pour tous ou pour l'un quelconque des territoires qu'il représente dans les relations extérieures.

Article XXVI

Il ne sera admis aucune réserve au présent Protocole. Toutefois, un État pourra à tout moment déclarer par notification faite au Gouvernement de la République Populaire de Pologne que la Convention amendée par le présent Protocole ne s'appliquera pas au transport de personnes, de marchandises et de bagages effectué pour ses autorités militaires à bord d'aéronefs immatriculés dans ledit État et dont la capacité entière a été réservée par ces autorités ou pour le compte de celles-ci.

Article XXV

1. This Protocol shall apply to all territories for the foreign relations of which a State Party to this Protocol is responsible, with the exception of territories in respect of which a declaration has been made in accordance with paragraph 2 of this Article.

2. Any State may, at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Protocol does not apply to any one or more of the territories for the foreign relations of which such State is responsible.

3. Any State may subsequently, by notification to the Government of the People's Republic of Poland, extend the application of this Protocol to any or all of the territories regarding which it has made a declaration in accordance with paragraph 2 of this Article. The notification shall take effect on the ninetieth day after its receipt by that Government.

4. Any State Party to this Protocol may denounce it, in accordance with the provisions of Article XXIV, paragraph 1, separately for any or all of the territories for the foreign relations of which such State is responsible.

Article XXVI

No reservation may be made to this Protocol except that a State may at any time declare by a notification addressed to the Government of the People's Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

Article XXVII

Le Gouvernement de la République Populaire de Pologne notifiera immédiatement aux Gouvernements de tous les États signataires de la Convention ou du présent Protocole, de tous les États parties à la Convention ou au présent Protocole, et de tous les États membres de l'Organisation de l'Aviation civile internationale ou de l'Organisation des Nations Unies, ainsi qu'à l'Organisation de l'Aviation civile internationale:

a) toute signature du présent Protocole et la date de cette signature;

b) le dépôt de tout instrument de ratification du présent Protocole ou d'adhésion à ce dernier et la date de ce dépôt;

c) la date à laquelle le présent Protocole entre en vigeur conformément a l'alinéa 1er de l'article XXII;

d) la réception de toute notification de dénonciation et la date de réception;

e) la réception de toute déclaration ou notification faite en vertu de l'article XXV et la date de réception; et

f) la réception de toute notification faite en vertu de l'article XXVI et la date de réception.

EN FOI DE QUOI les Plénipotentiaires soussignés, dûment autorisés, ont singé le présent Protocole.

FAIT à la Haye le vingt-huitiéme jour du mois de septembre de l'anée mil neuf cent cinquante-cinq, en trois textes authentiques rédigés dans les langues français, anglaise et espagnole. En cas de divergence, le texte en langue française, langue dans laquelle la Convention avait été rédigée, fera foi.

Article XXVII

The Government of the People's Republic of Poland shall give immediate notice to the Governments of all States signatories to the Convention or this Protocol, all States Parties to the Convention or this Protocol, and all State Members of the International Civil Aviation Organization or of the United Nations and to the International Civil Aviation Organization:

a) of any signature of this Protocol and the date thereof;

b) of the deposit of any instrument of ratification or adherence in respect of this Protocole and the date thereof;

c) of the date on which this Protocol comes into force in accordance with Article XXII, paragraph 1;

d) of the receipt of any notification of denunciation and the date thereof;

e) of the receipt of any declaration or notification made under Article XXV and the date thereof; and

f) of the receipt of any notification made under Article XXVI and the date thereof.

IN WITNESS WHEREOF the undersigned Plenipotentiaires, having been duly authorized, have signed this Protocol.

DONE at The Hague on the twenty-eighth day of the month of September of the year One Thousand Nine Hundred and Fifty-five, in three authentic texts in the English, French and Spanish languages. In the case of any inconsistency, the text in the French language, in which the language of the Convention was drawn up, shall prevail.

Le présent Protocole sera déposé auprès du Gouvernement de la République Popularie de Pologne où, conformément aux dispositions de l'article XX, il restera ouvert à la signature, et ce Gouvernement transmettra des copies certifiées du présent Protocole aux Gouvernements de tous les États signataires de la Convention ou du présent Protocole, de tous les États parties à la Convention ou au présent Protocole, et de tous les États membres de l'Organisation de l'Aviation civile internationale ou de l'Organisation des Nations Unies, ainsi qu'à l'Organisation de l'Aviation civile internationale.

This Protocol shall be deposited with the Government of the People's Republic of Poland with which, in accordance with Article XX, it shall remain open for signature, and that Government shall send certified copies thereof to the Governments of all States signatories to the Convention or this Protocol, all States Parties to the Convention or this Protocol, and all States Members of the International Civil Aviation Organization or of the United Nations, and to the International Civil Aviation Organization.

EXHIBIT F

DEPARTMENT OF STATE
FOR THE PRESS

November 15, 1965 No. 268

The United States today gave formal notice of denunciation of the Warsaw Convention on the Unification of Certain Rules Relating to International Transportation by Air.

The Warsaw Convention was signed in 1929 and entered into force for the United States in 1934. The principal effect of the Convention is to limit the liability of air carriers for personal injury or death of passengers in international air transportation to approximately $8,300 per passenger in most cases. The Convention was amended by a Protocol signed at the Hague in 1955 which raised the limits of liability to approximately $16,600 per passenger, but the United States has never ratified this Protocol.

Today's action was taken under Article 39 of the Convention, which provides that any member country may denounce the Convention upon six months' notice. The notification carries out a decision, made known previously, that the United States would give notice of denunciation of the Warsaw Convention on November 15, unless by that time satisfactory provisional arrangements for the protection of international air passengers had been worked out among the principal international air carriers. A plan for a provisional arrangement whereby the international carriers serving the United States would waive their limits of liability up to $50,000 per passenger was recently proposed by the International Air Transport Association. However, the IATA proposal would have applied only to transportation to and from the United States covered by the Hague Protocol. Since the United States has not ratified the Hague Protocol, the IATA proposal would thus have been inapplicable to the great majority of United States travelers. In addition, it was felt that a ceiling of only $50,000 on recovery

by victims of air disasters would not justify continued adherence by the United States to the Warsaw Convention.

The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966 there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of $100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international air lines waiving the limits of liability up to $75,000 per passenger.

As stated in the note delivered today by the American Embassy in Warsaw to the Polish Government, the United States wishes to make clear that the action to denounce the Warsaw Convention is taken solely because of the Convention's low limits of liability for injury or death to passengers, and in no way represents a departure from the long-standing commitment of the United States to the tradition of international cooperation in matters relating to civil aviation.

In this connection, the United States notes that the Council of the International Civil Aviation Organization has called an international conference in Montreal beginning on February 1, 1966 to consider revision of the limits of liability for passengers under the Warsaw Convention. The United States welcomes the recognition by ICAO of the need to reconsider the question of compensation to victims of international air disasters. The United States will participate fully in the Montreal Conference, and hopes that it will be possible to arrive at an international consensus on this important question.

The full text of the notice of denunciation is as follows:

"Excellency:

I have the honor, under instructions from my Government, to give formal notification to the Government of the Polish People's Republic of the denunciation by the Government of the United States of America, for itself, its territories, and all other areas under its sovereignty or authority, of the Conven-

tion for the Unification of Certain Rules relating to International Transportation by Air and the Additional Protocol relating thereto signed at Warsaw on October 12, 1929. This notification is given in accordance with the provisions of Article 39 of the Convention.

"The United States of America wishes to state that it gives this notification solely because of the low limits of liability for death or personal injury provided in the Warsaw Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955.

"My Government would appreciate it if the Government of the Polish People's Republic would inform the Government of each of the High Contracting Parties to the Convention of this notification and the reason therefor. My Government would also appreciate it if the Government of the Polish People's Republic would inform the Government of the High Contracting Parties that the United States of America wishes to make clear its continued desire to maintain its tradition of international cooperation in matters relating to civil aviation. To this end, the United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and Hague Protocol but without limits of liability for personal injury or death."

* * *

EXHIBIT G

DEPARTMENT OF STATE
FOR THE PRESS

May 13, 1966 No. 110

The Department of State, in consultation and with the concurrence of the Civil Aeronautics Board, the Federal Aviation Agency, the Department of Commerce, and the Department of Defense, has concluded that the interests of the United States travelling public and of international civil aviation would be best served by continuing within the framework of the Warsaw Convention under a plan the essential features of which are:

First. The limits of international carrier liability for passengers will be increased from $8,300 to $75,000 per person. Those travelers who wish to carry greater protection will be free to take out additional insurance to cover their needs. There will be no limit on liability where the carrier is guilty of wilful misconduct.

Second. Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited. Long and costly lawsuits will be unnecessary in many cases.

Third. International airlines carrying well over 90 percent of Americans in international travel are participating in the plan. The recommendation of the Senate Foreign Relations Committee that no airline operating within the United States remain outside the plan has been substantially complied with. Those United States airlines which initially declined to come within the plan have now indicated their agreement to accepting an increase in liability from $8,300 to $75,000.

Fourth. This is an interim arrangement terminable on twelve months' notice. In the months ahead public hearings will be held for the purpose of determining the definitive United States position in preparation for further international discussions concerning the Warsaw Convention.

Fifth. The international carriers who have notified the Civil Aeronautics Board of their acceptance of the interim arrangements are: Aeronaves, Air Canada, Air France, Air India, Aer Lingus, Alitalia, BEA, BOAC, Canadian Pacific, CMA, El Al, Icelandic, Iberia, Japan Air Lines, KLM, Lufthansa, Olympic, Philippine Airlines, Qantas, Sabena, SAS, Swissair, Varig and VIASA; American, Braniff, Continental, Eastern, Northeast, Northwest, Pan American, Panagra, TWA and Western. The following United States airlines mainly engaged in domestic carriage which have accepted the increased limits of liability but not the feature of absolute liability are: Delta, National and United. It is expected that other carriers will join the plan.

Sixth. Those guilty of sabotage and persons claiming on their behalf will not be entitled to recover any damages.

By acceptance of the plan the United States and all of the other participating countries have assured the continuation of the uniform system of law governing airlines, shippers and passengers and have demonstrated again the viability of the system of international cooperation in civil aviation and in international law.

* * *

EXHIBIT H

DEPARTMENT OF STATE
FOR THE PRESS

May 14, 1966 No. 111

In accordance with the decision announced yesterday, the United States Government today formally withdrew its notification of termination of adherence to the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air. The withdrawal took the form of a note delivered by the United States Embassy in Warsaw to the Polish Ministry of Foreign Affairs at 11:00 A.M. today local time.

The text of the note is as follows:

Excellency,

I have the honor, on instructions from my Government, to give formal notification to the Government of the Polish People's Republic of the withdrawal by the United States of America of the notice of denunciation submitted on November 15, 1965 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air and the Additional Protocol relating thereto signed at Warsaw on October 12, 1929.

At the time the notice under Article 39 was submitted, the United States Government stated that that action was taken solely because of dissatisfaction with the low limits of liability for death or personal injury provided in the Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955. Since that time, intensive negotiations among carriers and among governments have succeeded in establishing a new interim arrangement in accordance with Article 22(1) of the Convention, whereby participating carriers have agreed, in cases of the death, wounding, or other bodily injury of a passenger, to limits of liability of $75,000 per passenger inclusive of legal fees and costs (or $58,000 exclusive of legal fees and costs in case of a claim brought in a State where provision is made for separate

award of legal fees and costs) and have agreed not to avail themselves in any such cases of any defense under Article 20(1) of the Convention, or the Convention as amended by the Hague Protocol. This arrangement is applicable to all international transportation by the carrier as defined in the Convention or the Convention as amended by the Hague Protocol which according to the contract of carriage includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

In view of the acceptance of this arrangement by the great majority of the world's international airlines, including all principal carriers serving the United States, the conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes that its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention. The United States of America looks forward to participation by all carriers and governments in the provisional arrangement described above and to its acceptance on a worldwide basis. Further, the Government of the United States looks forward to continued discussions looking to an up-to-date and permanent international agreement on the important issues dealt with in the Warsaw Convention.

My Government would appreciate it if the Government of the Polish People's Republic would inform the Government of each of the High Contracting Parties to the Convention of this notification.

* * *

EXHIBIT I

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Order No. E-23680

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 13th day of May, 1966

Docket 17325
Agreement C.A.B. 18900

Agreement Relating to Liability
Limitations of the Warsaw
Convention and the Hague Protocol

ORDER APPROVING AGREEMENT

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over ninety countries likewise became parties to the Convention.[1] On November 15, 1965, the United States Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers.

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1 The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention, (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

Pursuant to Article 39 of the Convention this notice would become effective upon six months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's Economic Regulations and assigned the above designated C.A.B. number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which

results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the United States Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States.

The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The United States Government has concluded

that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly sections 102, 204(a), and 412 thereof:

IT IS ORDERED THAT:

1. Agreement C.A.B. 18900 is approved.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

EXHIBIT J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

The Solicitor General's Memorandum[1] has failed to inform the Court of the severe impact which the majority decision of the Court below has had upon the international aviation relations of the United States, and of the doubt which this decision has cast upon the reliability of the United States in abiding by the rules established by the Treaty.

I.

To date, AUSTRALIA, BRAZIL, CANADA, ITALY, THE FEDERAL REPUBLIC OF GERMANY, THE NETHERLANDS and THE UNITED KINGDOM, have each officially protested to the Government of the United States that the majority decision of the

1 Filed pursuant to the Court's Order of May 15, 1967, which reads: "The Solicitor General is invited to file a brief expressing the views of the United States."

Court below is contrary to their agreement with the United States as expressed in the Treaty.

All of these nations participated in the drafting of the original Treaty. They know that the imposition of the sanction in Article 3(2) was intended to be limited to cases of non-delivery of the passenger ticket. They know that this intent is clearly expressed in the Treaty. The Government of the United States also knows it. Otherwise, why did the United States urge, in 1955, that the Treaty be amended so as to extend the scope of the sanction to cases of failure to give notice?

II.

The Solicitor General's Memorandum overlooks the views of the United States as expressed by its official representatives at the Hague Conference in 1955 where several amendments to the Warsaw Convention were then being considered. At that time, the United States sought and achieved an amendment to the Treaty to extend the sanction in Article 3(2) to cases where the passenger ticket fails to include notice that the limits of liability may be applicable.[2]

If the majority decision of the Court below is correct, as urged by the Solicitor General, then the United States is made to appear to have sought and obtained a wholly unnecessary amendment to Article 3(2) in 1955.

When the Solicitor General was a member of the Court of Appeals for the Second Circuit, he placed conclusive reliance on the official position of the Government of the United States at the Hague Conference in 1955 in deciding a question involving the proper interpretation of Article 2 of the Warsaw Convention. In *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d

2 I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 134 (1955). The Hague Protocol amending the Warsaw Convention in this and other respects has never been ratified by the United States, nor does it appear probable that it ever will be ratified. See, S. EXEC. DOC. H, 86th Cong. 1st Sess. (1959); S. EXEC. REPT. NO. 3, 89th Cong. 1st Sess. (1965); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 504-516, 532-546 (1967).

851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), the argument was advanced by the plaintiff that transportation performed under contract for the Military Air Transport Service of the United States Government fell within the scope of the reservation of the United States under the Additional Protocol with respect to Article 2, and, therefore, was not subject to the Warsaw Convention. In affirming the District Court's rejection of this argument, then Judge Marshall reasoned as follows:

> "The regularity of the chartering relationship between the United States and defendant gives us some cause to look upon this analytic distinction with some circumspection. *But these doubts are dispelled by the negotiations surrounding the adoption of the Hague Protocol of 1955*. See generally, International Conference of Private Air Law, The Hague, September 1955, International Civil Aviation Organization, Doc. 7686-LC/140
>
> "A draft protocol was prepared by the Legal Committee of the International Civil Aviation Organization at Rio de Janeiro in September 1953 and was submitted to the Hague Conference in September 1955. It sought to amend Article 2 of the Convention to read: 'The Convention shall not apply to * * * [c]arriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reserved by such authorities.' *The natural inference from this effort to amend the Convention is that without such an amendment the Convention would be applicable to such flights, or at least those proposing the amendment thought so. . . . The unavoidable conclusion* is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit." 341 F. 2d 851 at 853-4. (Emphasis added.)

Now, however, the Solicitor General would ignore these negotiations in a virtually identical situation, and thereby avoid an equally "unavoidable conclusion," involving the proper interpretation of Article 3(2) of the Convention.

III.

The Solicitor General's Memorandum contends that this case is of "little prospective importance" in view of the 1966 agreement among a number of airlines (including Petitioner) to a new limit of liability of $75,000, and the form of notice of the applicability of this new limit now required by the Civil Aeronautics Board. This same argument was advanced by Respondents in their brief, and was dealt with in detail in Petitioner's reply brief at pages 3-5.

This contention is lacking in merit in view of the following factors:

1. The United States is still a party to the Warsaw Convention.

2. The basic question involved is whether the sanction in Article 3(2) applies in the event of failure to give notice of the applicability of the limit of liability established by the Treaty.

3. This question will repeatedly arise in the future, regardless of the amount of the limitation which may be in force, and regardless of the form of notice which may be required by the Civil Aeronautics Board.

4. The question of whether the sanction of absolute unlimited liability in Article 3(2) is to be applied for failure to give notice will recur constantly in subsequent cases where no notice has in fact been given, or where some Court concludes, as did a majority of the Court below, that the CAB approved form of notice is inadequate for one reason or another. Significantly, the CAB approved form of notice now in use is not required to be printed on the ticket, but may be set forth on a separate paper. 14 C.F.R. § 221.175. A fact question as to whether a passenger actually received this slip of paper is bound to arise in many, if not most, future cases because of the holding of the majority decision of the Court below. A carrier, confronted with the contention by a passenger that he did not receive the slip of paper, will certainly include in its defense a contention that the Treaty does not require notice in any event, and that no sanction applies under the Treaty for the failure to give notice of the limita-

tion of liability. Thus, the identical questions presented by the Petition herein are certain to arise again and again in aviation accident litigation is this country.

5. There are more than 100 cases pending today in the courts of the United States involving the Warsaw Convention and passenger tickets and baggage checks identical in form to those involved herein. Final resolution of these cases will be directly affected by the ultimate decision in this case.

6. The same form of passenger ticket and baggage check as involved herein is still in daily use throughout the world by all members of IATA and ATA.

IV.

This is not a "small print" case, as the Solicitor General's Memorandum assumes. The Petition presents basic questions involving proper interpretation of the Treaty, and as such they are important questions of federal law which have not been, but should be settled by this Court.

The Solicitor General's Memorandum ignores the legislative history of the drafting of Article 3(2). This history demonstrates unequivocally the intent of the drafters to limit the imposition of the sanction in Article 3(2) to cases of non-delivery of the passenger ticket. An early draft of Article 3(2), which would have extended the imposition of the sanction to cases of failure to include the notice in the passenger ticket, was expressly considered, and after debate, rejected by the parties. See, II[ème] CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN, ICAO Doc. 7838, pp. 100-101, 129, 168 (1930); Petition, pp. 10-12.

This clear intent of the parties to the Treaty is evident from a comparison of Article 3(2) with Articles 4(4) and 9. The Solicitor General's Memorandum treats lightly of the significant distinction between these related articles, and purports to distinguish *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) on this point. In a "carefully prepared

opinion" adopted by the Court of Appeals, District Judge Noonan analyzed the distinction between Articles 3(2) and 4(4) and 9, and concluded that the parties clearly intended that the imposition of the sanction in Article 3(2) be limited solely to cases of non-delivery of the passenger ticket. Judge Noonan stated:

> "Article 3(2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4(4) and 9. *I must conclude that this omission or difference is most significant.* For I cannot agree with plaintiffs' argument that Article 3(2) intends that the ticket delivered contain the items set forth in Article 3(1), when those who drafted the treaty were so explicit in this regard in Articles 4(4) and 9." 95 F. Supp. 756 at 758. (Emphasis added.)

CONCLUSION

The substantial error of the majority decision of the Court below, and the necessity for review by this Court, are best expressed in the words of Judge Moore:

> "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability.
>
> * * * * *
>
> Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." (R. 74a-75a; Appendix B, pp. 24-25).

Notwithstanding the view advanced by the Solicitor General's Memorandum, the questions presented herein should be decided finally by this Court.

Respectfully submitted,

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July 18, 1967

EXHIBIT K

No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A., PETITIONER

v.

JOHN LISI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

In June 1967, at the invitation of the Court, the government filed a memorandum suggesting that the decision below was correct.[1] That memorandum also pointed out that the Civil Aeronautics Board had not purported to pass upon, much less to decide, the size of type face or other typographical details which the airlines should employ in printing the warning re-[2]quired with respect to limited liability under the Warsaw Convention. In light of the fact that the briefs of petitioner and others urging reversal, filed since the Court granted the petition, contain various statements as to the meaning and effect of the Board's past actions and its authority over the subject matter of the notice requirement, we submit this memorandum to clarify the Board's role in this area.

1 In a memorandum filed on December 22, 1967, in response to an invitation from the Court in *Berguido* v. *Eastern Airlines, Inc.*, No. 528, this Term, the government reiterated its position that a ticket purporting to warn of limited liability under the Warsaw Convention does not of itself comply with Article 3 of the Convention if printed in type too small to attract reasonable notice.

The air carriers have at no time presented for Board approval any agreement relating to the size of type to be utilized in relation to any matter appearing on a ticket, either generally or in relation to the Warsaw Convention. Prior to the accident here involved, the Board, pursuant to the provisions of Section 412 of the Federal Aviation Act, 49 U.S.C. 1382, had regularly approved agreements containing the language in which the warning regarding limited liability was couched, and also had accepted for filing various tariff rules containing such language. As far as the Board was concerned, however, the carriers were at liberty to utilize any type they chose, and otherwise to determine the typographical manner in which the warning was given. Furthermore, the Board had not at any time expressed any views on the size of type necessary to give adequate notice to the public. It was not until 1964 that the Board imposed a requirement for minimum type size and for use of contrasting ink and stock with respect to such warning. Even then, that requirement was imposed primarily under the tariff filing provisions of Section 403, of the Act, 49 U.S.C. 1373, and did not purport to represent any Board determination that the Warsaw Convention requires [3]either larger or smaller type. While the views of the Board as the agency charged with regulating air transportation under the Federal Aviation Act might be persuasive with respect to what constitutes adequate notice under the Warsaw Convention, the Board has not taken the position that the adjudication of this matter is within its primary expertise, nor has it acted on such a premise. The Board recognizes no reason why the question of what the Warsaw Convention requires may not be decided judicially as an independent matter.

I

An understanding of the nature and effect of the Board's actions will be facilitated by a brief description of the statutory provisions involved. Section 412 of the Federal Aviation Act requires that air carriers file with the Board copies of their agreements with other carriers which affect air transportation, and directs the Board to disapprove any such agreement which it finds to be adverse to the public interest or in violation of the

Federal Aviation Act. If the Board does not make such findings, the statute directs the Board to approve the agreement. A consequence of approval is to relieve the carriers involved from the restraints imposed by the antitrust laws and related statutes.[2]

The Board asserts the authority to impose, as a condition of its approval of a particular agreement, qualifications which it deems necessary to safeguard the overall public interest. In this way the Board [4]on occasion may require action which it could not otherwise demand. Since, however, hundreds of agreements are filed each year, the Board is not in a position to explore exhaustively the legality of particular agreements under other laws (including treaties), or to focus upon every conceivable circumstance in which the public interest might be served through the attachment of conditions.

Additionally, Section 403 of the Act requires that carriers file their tariffs with the Board. Under familiar principles, provisions for exculpation from liability may be included therein and, in appropriate circumstances, have the force of law. (The Board ordinarily accepts for filing those tariffs which conform to its rules, and the mere acceptance of a tariff constitutes no determination as to the lawfulness of any provision contained therein.) Furthermore, the implementation of an agreement between carriers on the subject of rates or liability may depend on the filing with the Board of tariffs embodying the agreed-upon rate or exculpatory provision.

Finally, Section 204 of the Act, 49 U.S.C. 1324, vests in the Board the broad investigative and rule-making authority necessary to the discharge of its duties.[3]

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2 Section 414, 49 U.S.C. 1384.

3 Section 204(a) provides (49 U.S.C. 1324(a)):

> The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act.

[5] II

In 1949, the Board had before it the initial IATA Traffic Conference resolutions establishing a uniform passenger ticket, baggage check, and air waybill, as well as IATA's proposed conditions on liability for injury to passengers, baggage and cargo in international transportation. Included in the liability provisions was a proposed warning to be placed in the carriers' tickets to give notice of the Warsaw Convention.[4] The carriers represented, and the Board agreed, that the adoption of uniform ticketing and interline arrangements between carriers would produce significant benefits to the traveling public, and on the basis of these considerations the Board approved the use of a uniform ticket, *IATA Traffic Conference Resolutions*, 10 C.A.B. 783.[5] There was, however, no request that the Board approve any particular size for the ticket or the type, and indeed it appears that not even a specimen ticket was pre-[6]sented for the Board's consideration.[6] On the contrary, the resolution in terms provided "(3) that the questions of language and size be left to each member." The Board's opinion contains no reference to the proposed language relating to the Warsaw Convention, and in dealing with other proposed exculpatory conditions the Board made plain that it was not attempting to pass upon the requirements of the Convention. Rather, the Board pointed out (10 C.A.B. at p. 787) that the carriers had "represented

4 The proposal provided: "(4) that the Conditions of Contract on the inside cover of the Passenger Ticket and Baggage Check read as follows:

"*Conditions of Contract*

• • • • •

"(2)(a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called "the Convention") unless such carriage is not 'international carriage' as defined by the Convention. (See Carrier's tariffs for such definition.)"

5 See pp. 2 and 3 of the Joint Brief of ATA and IATA in this Court, pointing out the advantages of a uniform ticket.

6 The entire agreement filed with the Board, including the warning provision, was typed in 10 point size type.

* * * that these resolutions are not in abridgement of" the Convention, but rather that their purpose was "to place the same ceiling on liability in non-Warsaw air transportation as is provided under the Warsaw Convention * * *." Although the Board found (*id.* at p. 788) that this proposal was "a step away from the public policy of this country" with respect to carrier liability, it accepted most of the details of the conditions of carriage, including the provision relating to notice (footnote 4, *supra*), subject to further study on the part of the carriers and action by the Board. In addition, the "notice" provisions were later included in various tariffs filed with the Board, but there was no Board tariff rule then in force specifying the size of type to be utilized in the warning notice.

In 1954, the IATA carriers submitted additional resolutions relating to the uniform ticket and the limitation of liability for international passengers. One such resolution contained the warning language in substantially the same form as the 1949 resolution. [7]After the over-all resolution had been initially disapproved on various grounds, see Order E-8543, 24 C.A.B. 580, informal conferences were held and the Board approved as not adverse to the public interest an amended resolution containing a notice and various other exculpatory provisions. *Pan American World Airways, et al., Conditions of Carriage*, 24 C.A.B. 575.[7] As pointed out by the Joint Brief of ATA and IATA before this Court, the Board stated that the revised notice provision had been improved. However, the Board again was explicit in declaring that its action did not constitute determination of compliance with the Warsaw Convention.[8] Further-

7 Again, the agreement filed with the Board, including the Warsaw Convention notice, was typed throughout in 10 point size type.

8 In the one area in which a Warsaw compliance problem was discussed, the Board clearly distinguished between the "public interest" standard of the Federal Aviation Act and the provisions of the Convention, 24 C.A.B. at p. 577:

[T]he Board's approval merely finds as not adverse to the public interest an agreement between the carriers to insert in their conditions of

more, the carriers did not request Board approval of any ticket form as such, or of any proposal with respect to the size of type to be utilized therein.[9]

[8] III

In 1963, prompted by a new agreement relating to the Warsaw Convention and in order to reexamine the 1957 IATA resolution, the Board issued a notice of proposed rule-making pursuant to its powers under Sections 204(a), 401(e), and 403 (the tariff filing provisions),[10] and 411 (unfair competitive practices)[11] to the effect that the "type in which the notice is currently printed on the ticket is too small to alert the passengers to the importance of the matter." 28 F.R. 3281, 3282. Subsequently, in 1964, the Board specified that the carriers must give notice "in type at least as large as 10 point modern type and in ink contrasting with the stock" (14 C.F.R. 221.175). This requirement undoubtedly constituted the Board's view as to the size of type likely to provide a passenger with effective notice of a limitation on carrier liability. Again, however, in promulgat-

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contract a provision that the agreed stopping places for the purpose of the Convention shall be the scheduled stopping place on the passenger's route shown in the timetables, and is in no sense a determination by the Board that such provision meets the requirement of the Convention that the agreed stopping places be contained in the ticket.

9 We believe it is misleading for ATA and IATA in their Joint Brief to assert that at the time of approval the Board had before it a specimen ticket disclosing the size of type to be employed and to create thereby the inference that the Board approved such size. A specimen ticket was attached to a resolution dealing with the types of information to be inserted in various portions of a uniform ticket, but there was no submission of the ticket with reference to the notice of limitation of liability. Furthermore, as noted in the text, there was no request for approval of any particular size of ticket or size of type with respect to the Warsaw Convention notice. Neither, it may be added, did the tariffs filed in implementation of the approved resolution contain any such specification, nor did the Board's tariff filing regulations then require any minimum size type in relation to the notice.

10 49 U.S.C. 1324(a), 1371(e), 1373.

11 49 U.S.C. 1381.

ing this rule, the Board did not profess to be codifying or in any way determining what size type may be required by the Warsaw Convention.

[9] IV

In sum, the Board has never been repesented with any carrier agreement purporting to fix the size of type or other typographical details of the Warsaw Convention notice. Nor has the Board claimed primary jurisdiction to pass upon those questions. When the Board did focus on the adequacy of the notice of limited liability in 1963 and found that a minimum size type should be prescribed, the Board was not endeavoring to determine the requirements of the Warsaw Convention; rather, it imposed the requirement for minimum size type to effectuate the statutory public-interest test. While it is true, as the ATA suggests, that the Board had equal power to impose such a requirement prior to the accident here involved, the fact remains that the Board did not do so. Accordingly, the Board does not consider its actions as material to the disposition of this case, save to the extent that its 1964 requirement may be viewed as an expression of its view that lesser size type did not suffice to give adequate notice appropriate in the public interest.

Respectfully submitted.

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FEBRUARY 1968.

EXHIBIT L

No. 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CANADA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* and BRIEF OF CANADA *AMICUS CURIAE*

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December 20, 1967.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CANADA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Canada respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioner.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondents has refused consent.

Canada is a contracting party to the Warsaw Convention* and to the Hague Protocol**. As a contracting party **[2]** with the United States to the Convention. Canada has a direct and continuing interest in securing the uniform implementation of the Warsaw Convention in a manner consistent with the intentions of the contracting parties. The decisions below of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York ignore the intentions of the contracting parties, change by judicial fiat a clear and express provision of the Convention embodying the mutual commitments of the contracting governments and are contrary to the uniform construction placed upon this provision by all the contracting parties, including the United States.

Canada has also cooperated with the United States to assure the effectiveness of the special agreement (the so-called "Interim Agreement") developed in Montreal in May 1966 among various air carriers providing for the increase in the limitations of liability applicable under the Convention and Protocol with respect to air carriage to and from the United States.*** In consequence of the decisions below, the future operation of the Interim Agreement and its salutary results are in jeopardy.

Canadian air travelers and air carriers, publicly and privately owned, have a profound interest in retaining the benefits for international air travel achieved by the Warsaw Convention in

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* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000; T. S. 876; Canadian *Carriage by Air Act*, 1939, c. 12, s. 1. See Canada's Notice of Accession to the Convention dated June 10, 1947, the text of which is annexed as Appendix A.

** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, September 28, 1955. Printed in Civil Aeronautics Board, Aeronautical Statutes and Related Material 324-66 (1963); Candian *Carriage by Air Act*, as amended, 12 Eliz. II. Chap. 33 (1963). See Canada's Instrument of Ratification of the Protocol dated March 20, 1964, the text of which is annexed as Appendix B.

*** 31 Fed. Reg. 7302 (1966). See Note delivered by the Canadian Embassy in Washington, D.C. to the State Department dated May 12, 1966, the text of which is annexed as Appendix C.

promoting uniformity in ticketing and in regulating air carrier liability. The decisions below threaten to destroy this uniformity.

Canada seeks leave to intervene as *amicus curiae* to voice its objections to the interpretations placed upon the Warsaw Convention by the Courts below and to apprise **[3]** this Court of the serious implications for the future in allowing the decisions below to stand.

For the foregoing reasons, it is respectfully requested that this motion for leave to file a brief as *amicus curiae* be granted.

Dated: December 20, 1967.

Respectfully submitted,

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[5] IN THE

Supreme Court of the United States

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Respondents.

BRIEF OF CANADA AS *AMICUS CURIAE*

Statement

It is the position of Canada, as a signatory to the Warsaw Convention, that the decision below of the majority of the Court of Appeals does not give effect to the intentions of the contracting parties and that, if permitted to stand, would effect a unilateral and substantive amendment in the Convention. Such a judicially imposed amendment could effectively frustrate the recent steps taken to liberalize the Convention's provisions.

Canada submits that

(1) Article 3 of the Convention does not impose a requirement as a condition for limitation of liability that a prospective passenger receive notice [6] that the transportation is subject to the rules relating to liability established by the Convention.

(2) it was the intention of the contracting parties under Article 3(2) of the Convention that if an air carrier delivers

a ticket to a prospective passenger the limitations of liability under the Convention are applicable,[1] and

(3) the delivery of the tickets in the instant cases fulfilled the requirement under Article 3(2) of the Convention.

Canada further submits that the Interim Agreement[2] developed in Montreal in May 1966 under Article 22(1) of the Warsaw Convention (pursuant to which international air carriers stopping in the United States accept liability without regard to fault up to a limit of $75,000) is bottomed upon continued adherence by the contracting parties to the Convention and to its continued implementation in accordance with the intentions of the contracting parties. The interpretation of the Convention in the decisions below, if left standing, taken in conjunction with the carrier's obligations under the Interim Agreement, could result in absolute and unlimited liability being imposed upon the air carrier without regard to fault.

[7] Argument

The Courts below, in their consideration of the airline's ticket involved in this case and in relating it to Article 3 of the Warsaw Convention, expressed two fundamental misconceptions about the Convention: one with respect to the significance of the delivery of the ticket as required by Article 3(2) and the

1. Article 3(2) provides:

"The absence, irregularity or loss of the passenger ticket does not affect the existence of the validity of the contract of carriage which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability." 49 Stat. 3000, 3015.

2. The Interim Agreement is filed with the Civil Aeronautics Board as C.A.B. Agreement No. 18,900 (Order Series No. E-23680). See 31 Fed. Reg. 7302 (1966). A copy of the text of the Interim Agreement is annexed as Appendix D.

other with respect to the purpose of the enumeration in Article 3(1) of information for inclusion in the ticket.[3]

Under the plan of the Convention, the delivery by the carrier of the passenger's ticket is the act which invokes the full operation of the Convention. As learned commentators have pointed out: "All determinations regarding applicability of the Convention are based on the ticket." Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 500 (1967). These commentators further note: ". . . once the ticket has been issued, it makes no difference to applicability which airline performs the carriage . . ." *id.* at 501. Thus, it is the act of delivering the ticket that is made of controlling significance under Article 3(2).

The notion advanced by the Courts below that the requirement of delivery should be construed as establishing a further and unwritten requirement that the passenger be afforded a "reasonable opportunity" to take steps to protect himself against limitation of liability was adopted from two earlier Court of Appeals cases, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965) and *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965).

[8] However, in both the *Mertens* and *Warren* cases the Courts were presented with situations where there had in fact been no delivery of a ticket prior to the commencement of the carriers' responsibility for the passengers as laid down in Article 17 of the Convention. Thus the express requirement of Article 3(2) that there be delivery of a ticket had not been complied with before the air travel commenced. The further and indefinite requirement of affording the passenger a "reasonable opportunity" to take some other action, which the Courts in *Mertens* and *Warren* suggested be read into the Convention, was unnecessary to their decisions. The reiteration and expansion of this requirement by the Courts below in the instant cases

3. The Solicitor General in his argument opposing the petition for a writ of certiorari similarly failed to grasp these aspects of the Convention when he asserted that a literal reading of Article 3(1) would "deprive" that provision of "purpose and meaning." Memorandum for the United States as *Amicus Curiae*, p. 7.

result in an addition to the Convention which was specifically rejected by the contracting parties.[4]

The further misconception implicit in the decisions below is the notion that Article 3(1), and particularly Article 3(1)(e), has a purpose other than to prescribe a descriptive outline of what the passenger ticket shall include. The declared purpose of the Warsaw Convention was to regulate for international air travel "in a uniform manner"

> —"the documents used for such transportation" and
> —"the liability of the carrier".
> 49 Stat. 3000, 3014.

Article 3(1) is not concerned with sanctions, but with describing what, in the interests of uniformity, a passenger ticket for international air travel should contain.

The success of the Convention in this regard is evidenced by the form of ticket involved in the instant cases which was the standard form in general use by substantially all international air carriers, including Canadian air carriers. It was approved by the Civil Aeronautics Board (24 C.A.B. 575 (1957)) pursuant to its powers under the Federal Aviation Act of 1958, 72 Stat. 770, 49 U.S.C. § 1382.

[9] Disregarding the fundamental concepts of the Convention relating to the delivery and the description of the ticket, the Courts below in their decisions wrote into the Warsaw Convention their own domestic concept of adequate notice as a condition precedent to the application of the limitation on liability provided for in the Convention. Any such change in the Convention is a subject for multi-lateral negotiation among the contracting parties, not for judicial fiat.[5]

4. A proper construction of the Convention is found, we submit, in Grey v. American Airlines, Inc., 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956).

5. Such an amendment to Article 3(2) of the Convention should not be confused with unilateral steps properly taken by contracting parties within their own jurisdictions to regulate the manner in which carriers bring to the attention of passengers the applicability of the Convention's limitations on liability. The C.A.B. on behalf of the United States has properly taken such

The Courts effected this amendment by lifting one of the descriptive provisions in Article 3(1) to the status of a condition which must be met under Article 3(2) in order for the air carrier to avail itself of the provision in the Convention relating to limitation of liability. There is no basis in the Convention for singling out Article 3(1)(e) as was done by the Courts below. If such decisions are permitted to stand, there can be no logical reason for excluding the other subparagraphs of Article 3(1) as conditions which also would have to be met by the air carrier in order for it to avail itself of the provisions relating to limitation of liability.

Moreover, this judicially imposed requirement creates uncertainty for the air traveler as to his rights and as to the availability of the limitation of liability defense to the air carrier and invites unending litigation and a proliferation of interpretations, including inconsistencies among the various jurisdictions, as to what constitutes adequate **[10]** notice.[6] Such judicial rewriting of the Convention is incompatible with the principles laid down by this Court with respect to the effect and interpretation of treaties.

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unilateral action in regulating the carriers' activities within the United States. 14 C.F.R. § 221.175 (1967). But, it is one thing for the United States to require carriers to take certain action within the United States; it is quite a different matter for the United States, either by its responsible administrative agency or by its courts, unilaterally to impose as a sanction for failure to comply with these regulations the removing of the Convention's limit of liability.

6. One need not look beyond the decisions of the Courts below for an example of the problems created by the strained interpretation of Article 3(2). The District Court determined that the language on the ticket in question in this case would have constituted adequate notice had it been readable (253 F. Supp. 237, 243 n. 7). On the other hand, despite the fact that the Civil Aeronautics Board had approved the very form of passenger ticket involved in these cases, 24 C.A.B. 575, the Court of Appeals stated that it was highly questionable whether the language contained on the ticket would have constituted adequate notice even if readable (370 F. 2d 508, 514 n. 10). The differing opinions on the question of adequate notice, both as to substance and form, are limited only by the number of courts willing to entertain this question in the applicable jurisdictions of the various contracting parties.

As a treaty made under the authority of the United States the Warsaw Convention is a part of the "supreme Law of the Land". U.S. Const. art. VI, § 2. It may not be vitiated or amended in its implementation by reading into it requirements of local domestic law relating to notice and providing for sanctions for failure to comply with such local requirements. The plain language of Article 3(2) permits limitation of liability in all instances except where no ticket is delivered by the carrier.

Deviation from the purport of language and clear intention of the contracting parties to a treaty is not permissible. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821); *Maximov* v. *United States*, 373 U.S. 49, 54 (1963).

Moreover, in ascertaining the meaning of a treaty it is appropriate to look to the negotiations of the contracting parties and to their own practical construction of the treaty. *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-95 (1933); see also *Block* v. *Campagnie Nationale Air France*, Docket No. 21609, CA 5, Nov. 8, 1967 (Slipsheet, pp. 28-31).

[11] The history of the negotiations in the period 1925 to 1929, treated in the petitioner's brief, shows that the contracting parties expressly rejected the language which the Courts below read into the Convention. Moreover, the proceedings at The Hague in 1955, similarly treated in petitioner's brief, confirm that the practical construction given the Convention by the United States as well as other contracting parties was contrary to the interpretation of the Courts below.

The recent judicially imposed requirement of notice under Article 3(2) of the Convention is particularly untenable when viewed with the 1966 Interim Agreement among various international air carriers (see Appendix D), which was prompted by the action taken by the United States to withdraw from the Convention.

On November 15, 1965, the United States gave notice of its denunciation of the Warsaw Convention. On the same day it issued a press release stating it would be prepared to withdraw the notice of denunciation if there were a reasonable prospect of an international agreement on limits of liability in the area of $100,000 per passenger and suggesting that, pending such international agreement, an arrangement among principal interna-

tional airlines could be arranged waiving the limits of liability up to $75,000 per passenger. 53 Dep't State Bull. 923 (1965). The effective date of the denunciation, as provided in Article 39 of the Convention, was to be May 15, 1966.

Immediately prior to the effective date, Canadian and American air carriers, as well as other air carriers, entered into the Interim Agreement, the recognized purpose of which was to provide a basis upon which the United States would withdraw its notice of denunciation of the Convention. 31 Fed. Reg. 7302 (1966).

[12] The Interim Agreement embodies two significant provisions:

> 1. It increased the limit of liability from approximately $8,300 to $75,000 per person on transportation to, from or with an agreed stop in the United States;[7] and
>
> 2. It provided for waiver by the air carriers of Article 20(1), which would otherwise enable the air carrier to avoid liability if it proved that it took necessary steps to avoid the damage or proved that it was impossible to take such measures.

Thus, the Interim Agreement resulted in the imposition of absolute liability of up to $75,000 upon the signatory carriers for all provable damages assuming the passenger did not cause or contribute to the damages. In addition, the Agreement set forth an exact form of notice as well as the type point to be used on or attached to the ticket, ticket envelope, or a piece of paper placed in the ticket envelope or attached to the ticket.

On May 11, 1966 the Canadian Air Transport Board telegraphed the Civil Aeronautics Board that on the assumption the United States was withdrawing denunciation of the Warsaw Convention the Air Transport Board would accept filings incorporating the provisions of the Interim Agreement. In a subsequent Note to the State Department, the Canadian Embassy informed the United States that the text of this telegram reflected the views of **[13]** the Canadian Government in this mat-

7. $58,000 of jurisdictions where provision is made for separate award of cost of litigation.

ter. See Appendix C. On May 16, 1966, the United States announced its decision to withdraw its notice of denunciation.[8] On the same day, the Civil Aeronautics Board approved the Interim Agreement by Order, stating:

> "The U.S. Government has concluded that such arrangements [*i.e.*, the Interim Agreement] warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. *Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom*, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States." 31 Fed. Reg. 7302 (1966). (Emphasis supplied.)

The Canadian Government in its diplomatic note at the time expressed the hope that the Interim Agreement would be replaced by appropriate amendment to the Warsaw Convention and the Hague Protocol through diplomatic conference as soon as possible. See Appendix C.

If the decision below, and the reasoning upon which it is based, is not reversed, the signatories to the Interim Agreement, having waived any defenses they otherwise might have had under Article 20(1) of the Convention, would find themselves faced with uncertainty as to their limitation of liability, which would be dependent upon a showing that "adequate notice" of the Convention was contained on the ticket. The result would be absolute **[14]** but limited liability (up to $75,000) by reason of the Interim Agreement, but potential absolute and unlimited liability were the notice deemed by any court to be "inadequate". Thus, the Courts below, by their arbitrary construction of Article 3 have added an abiding uncertainty regarding the application of the Convention and thereby have jeopardized the recent steps taken, as reflected in the Interim Agreement, to liberalize the Convention provisions.

8. Dep't of State Press Releases Nos. 110 and 111, May 13 and 14, 1966; 54 Dep't State Bull. 955-57 (1966).

CONCLUSION

The decision and judgments below should be reversed.

Dated: December 20, 1967.

Respectfully submitted,

ROBERT MACCRATE,
Counsel for Canada,
48 Wall Street,
New York, N.Y. 10005.

ROBERT D. KRUMME,
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New York, N.Y.
Of Counsel.

724 (previously 275b)

PASSENGER TICKET—CONDITIONS OF CONTRACT

PSC1(01)724 Expiry: Indefinite
PSC2(01)724
PSC3(01)724 Type: A

RESOLVED that,

(1) the 'Notice' and the 'Conditions of Contract' on the Passenger Ticket and Baggage Check used for interline international carriage read as shown in Paragraph (2) below:

(a) the text of the Notice shall be printed in bold letters, eight point size, preferably in Helvetica or similar large character letters and the text of the Conditions of Contract, in six point size of the same character:

(b) Paragraph 2 of the text of the Conditions of Contract shall be printed in bolder type than the other paragraphs thereof.

(2) the titles and text of the Notice and Conditions of Contract are:

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notice headed 'Advice to International Passengers on Limitation of Liability'.

CONDITIONS OF CONTRACT

1. As used in this contract 'ticket' means this passenger ticket and baggage check, of which these conditions and the notices form part, 'carriage' is equivalent to 'transportation', 'carrier' means all air carriers that carry or undertake to

carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage. 'WARSAW CONVENTION' means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not international carriage as defined by that Convention.

3. To the extent not in conflict with the foregoing carriage and other services performed by each carrier are subject to:

   (i) provisions contained in this ticket,

   (ii) applicable tariffs,

   (iii) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route, carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its Agent.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within seven days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs or conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

10. Passenger shall comply with Government travel requirements, present exit, entry and other required documents and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

EXHIBIT M

724 (previously 275b)

PASSENGER TICKET—CONDITIONS OF CONTRACT

PSC1(01)724
PSC2(01)724
PSC3(01)724

Expiry: Indefinite

Type: A

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NOTICE

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CONDITIONS OF CONTRACT

1. As used in this contract 'ticket' means this passenger ticket and baggage check, of which these conditions and the notices form part, 'carriage' is equivalent to 'transportation',

'carrier' means all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage. 'WARSAW CONVENTION' means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not 'international carriage' as defined by that Convention.

3. To the extent not in conflict with the foregoing carriage and other services performed by each carrier are subject to:

(i) provisions contained in this ticket.

(ii) applicable tariffs.

(iii) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route; carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another carrier does so only as its Agent.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within seven days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs or conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

10. Passenger shall comply with Government travel requirements, present exit, entry and other required documents and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL DOCKET NO. 565
MISC. NO. 83-0345
WASHINGTON, D.C.
FEBRUARY 28, 1985

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

The above-entitled matter came on for hearing on motions of plaintiffs for partial summary judgment, before the Honorable Aubrey E. Robinson, Jr., Chief Judge, at 10 o'clock.

APPEARANCES:

DONALD W. MADOLE, ESQ.
JUANITA M. MADOLE, ESQ.
MILTON G. SINCOFF, ESQ.
GEORGE E. FARRELL, ESQ.
STEVEN POUNIAN, ESQ.
JAMES M. KENNY, ESQ.
FOR THE PLAINTIFFS

JAN K. VON FLATERN, ESQ.
THOMAS J. MCLAUGHLIN, ESQ.
MARY ROSE HUGHES, ESQ.
JAMES B. MCQUILLAN, ESQ.
GEORGE N. TOMPKINS, JR., ESQ.
FOR THE DEFENDANTS

DAWN T. COPELAND
OFFICIAL COURT REPORTER

[2] PROCEEDINGS

THE DEPUTY CLERK: In Re: Korean Air Lines.

Counsel, as you come to the podium, please state your name for the record.

THE COURT: Good morning.

Would you like to proceed?

MR. SINCOFF: The motion, your Honor?

THE COURT: Yes.

MR. SINCOFF: May it please this Honorable Court, my name is Milton Sincoff. I am co-chairman of the plaintiffs committee with Mr. Madole who will speak to other items on the agenda. And it is my privilege to present the position of the plaintiffs committee on the motion for summary judgment. Perhaps more precisely we could call it two motions wrapped up into one and the motion, of course, is against Korean Air Lines only and it is for summary judgment and it turns on the rather unique status of law that is peculiar to international aviation and somewhat alien to the more traditional principles that I suppose we are all accustomed to dealing with.

I don't believe there is any dispute among the plaintiffs and Korean Air Lines with regard to the applicable law.

I think it is clear that, and I don't believe there is any dispute that the Warsaw Treaty applies to all [3] the cases subject to these two motions.

The Montreal Agreement that was signed by Korean Air Lines is also applicable to these two motions.

I also don't believe that there is any dispute about the fact that the foreign air carrier permit issued to Korean Air Lines as well as federal regulations are also applicable.

Negligence, the traditional motions involving airlines, is not relevant to the motions at hand, although from reading some of the papers from our adversary, there seems to be some emphasis upon culpability. I don't feel it appropriate to comment on

that, comment on culpability, because as a legal matter, it is not relevant to the motions for summary judgment.

The reason for it very simply is that under the Warsaw Convention—Treaty and the Montreal Agreement, which are clearly applicable, fault is not an issue and that treaty and that agreement, which were created for the benefit and with the participation of airlines, and at the expense of innocent victims and passengers of airplane disasters, simply makes fault irrelevant and that regime creates no fault liability in exchange for a damage limitation on condition that the airline can take advantage of the damage limitation and must provide a specific clear warning to the passengers.

[4] That was a system that was started to be created in 1929. The United States became a party to the treaty in 1934 and I will comment later about the developments since that time.

Now, if I can just address what I think is the simpler of the two issues before the Court, and certainly in terms of the weight of these papers, it is the simpler of the two issues and that deals with the part of the motion in which all of the plaintiffs that are parties to this application, all 52, I believe, is the number, who have moved through the plaintiffs committee for the relief, and they seek simply to have paid immediately to them a sum of $75,000.

The reason for that application is the terms of the treaty and agreement state that applicable to the circumstances here, when a passenger is killed on this kind of an international flight, the airline is liable without any evidence of fault. Fault is irrelevant and the airline is liable up to $75,000.

All 52 plaintiffs who have moved have submitted affidavits to demonstrate their damages exceed the limit and some of the papers involve affidavits by people with direct knowledge such as widows and other family members. Some of the affidavits are presented by counsel, but it is certainly clear that the damages sustained exceed the [5] limit and we think that it is only fair and appropriate that rather than having Korean Air Lines have the benefit of $4 million which would be involved by simply multiplying the number of plaintiffs times $75,000, we think that that money should be paid, $75,000 to each family. They

after all, are the victims of this catastrophe and to alleviate in part the financial hardship, a prompt payment should be made.

Now, Korean Air Lines takes issue with the evidentiary showing by some of the plaintiffs and we submit that if there is any doubt about the evidentiary showing, and we don't think there is, but if there, then the alternative exists for this Court to direct Korean Air Lines to pay $75,000 for each of the deceased passengers into court so that that fund can be accruing interest for the ultimate benefit of the plaintiffs who are covered.

If I can invite the Court's attention to one or two affidavits that illustrate my point that there has been a proper showing, I would invite the Court to two sample affidavits attached to the motion from the plaintiffs committee dated February 17 and there is a pile of exhibits entitled "Exhibits Accompanying Plaintiffs' Motion for Partial Summary Judgment."

Within that body, there is—there are the affidavits for each individual family.

[6] If your Honor would like me to, I would just take one or two to illustrate my point.

There is one by—there is a one-page affidavit of five paragraphs by, for example, the widow of one of the passengers.

I am referring now to the widow Bevins. She says, she is the plaintiff. She is also the administratrix appointed to represent her husband's estate and her husband was a passenger and that in the motion papers, they conceded he was a passenger, and at the time he was 32 years old and earning approximately $31,000 a year. They had two children and all were dependent upon the decedent for support.

I think that clearly illustrates the damages recoverable will substantially exceed the damage limit.

There are other affidavits as well. I don't know if it is necessary for me to take the time of the Court unless the Court desires me to do so, but very simply put then, if there is any doubt about a particular plaintiff's showing, procedural doubt, the alternative is to pay the money into the court for investment in an interest bearing appropriate form or to create a fund which would be invested and administered by someone else other than the clerk of the Court.

And in many of the cases, I believe there is no doubt and the money should be paid immediately and directly **[7]** to each of the families of victims.

Now, turning to the other part of the motion that involves the bulk of the papers and citations and legal issues, I would like to refer first to the history of the treaty because I think it is directly relevant to the determination.

First, there are some things that are not in dispute. The first thing is that in the 23 cases, as I count them, which is about 40 percent of the total number of passengers who are making the overall application, 23 of the passengers received tickets which did not meet the standards required and there is no doubt because the affidavits submitted by Korean Air Lines concedes that these tickets were printed in eight point type.

I specifically refer to the affidavit of Abraham Meilen. He was the printing expert obtained by Korean Air Lines and on page 2 of his affidavit, he concedes that the ticket booklets for the 23 passengers were printed in eight point type.

The papers the plaintiffs committee submitted included two affidavits from printing experts who said it was eight point or less and I don't wish to quibble. Eight point is sufficient for purposes of the motion.

Now, the motion that is brought by the 23 families of these passengers seeks a declaration by this Court that **[8]** Korean Air Lines is liable.

There's no dispute that it is liable, but it is liable not by any—it is liable for actual compensatory damages sustained in each case without any damage limit. So we seek, therefore, for these 23 families, entry of a liability judgment leaving the only issue for trial, the compensatory damages for each family without damage limit.

The basis of the motion is founded upon two cases, the Lufthansa case in this Circuit and the Second Circuit case involving the Polish Air Lines crash in Warsaw. By coincidence, the Warsaw Treaty is also involved.

Now, in the late 1920's, governments in other countries convened a convention which was designed for the purpose of protecting the government air lines, an industry then in its infancy,

from the economic consequences for damages in the event of an airplane catastrophe.

The American Government was an observer at that international convention and as a result of it, there was born the Warsaw Treaty.

At that time, the Warsaw Treaty provided for imposing liability, shifting the burden of proof to the airlines, declaring it would be liable unless it could prove it was not culpable to any extent and the treaty also provided for damage limitation which was the equivalent at the time of $8,300 in American currency. **[9]** About five years later the United States adhered to that treaty, and that was in 1934.

As the years passed, the intensity increased with the satisfaction of the damage limitation and it became clear that the infant industry did not require the protection which was asserted as necessary in the late 1920's because ample insurance was available at reasonable costs and the net result of the treaty was to impose the economic burden on the families of victims as well as passengers who survived these airplane catastrophes.

As a result, the United States in 1965, because of its dissatisfaction with the limitation, denounced the treaty, withdrew the treaty and pursuant to the terms of the treaty, any government that withdrew was required to give six months' notice of the withdrawal before the withdrawal became effective.

Our government did indeed do that and the effective date was in 1966. And virtually on the eve of the effective date of our withdrawal of the treaty, the airlines who had previously resisted most strenuously an increase in the damage limitation finally relented and agreed to a formal Montreal contract which was approved by our Federal government. The essence of which was that the airlines would become absolutely liable without any defense of exculpation for no fault in exchange for, and that damage limit would **[10]** then become $75,000 per passenger on the condition that the airline provided each passenger with a warning about the damage limitation.

Our government was concerned about the warning and went so far as to specify the precise wording of the warning so that it would give notice to the passengers, in the government's view, and they also specified that to prevent any small print escaping

notice, the government regulation mandated the size of the print to be at least ten point type and the airline could, of course, print it even larger and there was a serious dispute as to whether even ten point type was adequate to give a lay passenger notice.

Nonetheless, the regulation had become effective in 1973 and in 1966 the government withdrew its denunciation and this Montreal Agreement/Warsaw Convention regime continued as it does through the present date as far as the United States is concerned.

Now, Korean Air Lines to take an economic advantage of the fertile United States traveling market applied to our government for permission to fly its planes to and from the United States.

Absent permission by our government, Korean Air Lines could not fly to our country.

The permit was issued to Korean Air Lines on **[11]** condition that it comply and one of the conditions precedent to that permit was that it comply with a number of requirements, one of which was that it provide tickets with this minimum of ten point type warning to passengers.

THE COURT: What did the Montreal Agreement provide with respect to any airline that failed to comply with the ten point type?

MR. SINCOFF: The Montreal Agreement did not specify the consequences. It simply stated—

THE COURT: So an airline, like the defendant Korean Air Lines, had a choice. If they did not want to fly in the United States, and to comply with this requirement, they did not apply for this authority to do so.

MR. SINCOFF: Precisely, your Honor.

THE COURT: But there was no other sanction provided in the Montreal Agreement.

MR. SINCOFF: Your Honor is correct.

THE COURT: Either with respect to the size of the print or the content of the notice.

MR. SINCOFF: The Montreal Agreement did require the notice. It did require the minimum—

THE COURT: If they chose not to give the notice, they could not fly in the United States. Is that correct?

MR. SINCOFF: That is correct, your Honor. They could not do so lawfully.

[12] Now, in 1973, ten years before this catastrophe, an attack was made by the airlines in the name of Lufthansa against this very regulation and the case is cited at page 8 of our brief and this Circuit rejected the attack and specifically declared that if they wished to take advantage of the limitation, they had to provide the notice.

That was Lufthansa against the Civil Aeronautics Board.

It was an attack on the regulation. It did not arise out of an airplane crash but it is clear from the holding that the Court specifically discussed that the regulation required that the ten point type notice and failure to comply with the notice would preclude taking advantage of the damage limitation.

Now, so from 1973 on, Korean Air Lines was on notice as to what the consequences were to be in the event that it did not comply with, number one, its signature to the Montreal Agreement, number two, to the conditions precedent of its air carrier permit.

Then came the Polish Air Line case and about 18 months before the Korean catastrophe, a Federal district court in New York declared that the failure of Polish Air Lines to abide by its foreign air carrier permit, its agreement of the Montreal Contract, the consequence was it could not take advantage of the limit and therefore the plaintiffs **[13]** were entitled to judgment on liability there being no damage limitation.

The sole distinction between the Polish Air Lines case, which was affirmed by the Circuit, the Second Circuit, cert. denied by the Supreme Court, the sole distinction between that case and this case is that the Polish tickets involved were printed in eight point five type, slightly larger than the conceded eight point type here.

The Court held that if you did not comply with the minimum ten point requirement, the consequence was that you could not take advantage of the damage limitation.

That was the square holding of the District Court and the square holding of the Circuit Court.

THE COURT: And that was the damage limitation in the Warsaw Convention. Is that correct?

MR. SINCOFF: Yes, $75,000 limitation.

THE COURT: And they related it to what provision of the Warsaw Convention?

MR. SINCOFF: They declared that Warsaw required the delivery of a ticket specifying the terms and conditions. There is no dispute that Warsaw has that provision.

Warsaw also has—the treaty, that is, itself has a provision that if you fail to deliver a ticket specifying the conditions of contract, that that failure constitutes a denial of the damage limitation.

[14] Indeed, another case cited by our brief is Lisi v. Alitalia. There the ticket that was delivered, as the Court called it, lilliputian-sized printed and the Court construed the Warsaw Treaty to say that you had to give notice in the delivery of the ticket that was reasonable and use of lilliputian size print, in that case, precluded the airline from taking advantage of the damage limitation.

So even before the Polish Air Lines case came along, it was clear that the size of the print was not a matter of inconsequence, as my friends in court would have it.

THE COURT: So the effect of that then is that each country can decide for itself how to interpret the provisions of Article 3 of the Convention?

MR. SINCOFF: No. I think what the Second Circuit held in the Lisi v. Alitalia case, that opinion was affirmed by an equally divided Supreme Court of the United States, but what it held was that in the United States where there is litigation and the plaintiff sues the airline properly in the United States, in our country, we are going to insist that in order for the airline to take advantage of the limitation it provide the required proper notice.

Now, the Polish Air Lines case reasoned, we think, your Honor, quite properly that having obtained the foreign air carrier permits with the condition precedent, having signed the Montreal Agreement, and having benefitted from **[15]** the—having benefitted financially from operating into this country, where suit is properly brought here, our American Courts are

going to require strict compliance with the minimum ten point type and that our Courts are not going to become involved in, well, it is nine point—is nine point five ok, eight point five ok, eight point ok.

Our Court in the Second Circuit held squarely that the regulation and the rule and the understanding was clear. It was unequivocable, a minimum of ten point type and when you didn't comply with that requirement which was very easy to do, all you had to do was make sure your print was the proper size, but if you did not comply, however less than ten point it may be, the airline was liable without limit.

Now, they say that it is unjust. We beg to differ. We think that the entire Montreal Agreement/Warsaw Treaty is unjust to the passengers, but if we have to live with that, as we do, then our rights are bound by that treaty and agreement, unfairly we, as passengers, say, then the airline has to live by its quid pro quo, its obligation for it to obtain the privilege of the limitation, and it is required and it is obligated to comply with what was well known and recognized as a simple minimal requirement, to print your tickets in sufficient size as you agreed to do and as the law requires.

[16] THE COURT: The only difficulty I have is that I find it extremely difficult to understand how airlines by agreement can amend a treaty.

MR. SINCOFF: It is a question that has been faced and—

THE COURT: That I do not understand. There isn't any question about the fact that we have Warsaw and Hague and they relate on a treaty.

You are here by virtue of the treaty jurisdiction in this Court and I find it extremely difficult to understand how you can possibly say that the Montreal Agreement between carriers under the threat of our denunciation of the Warsaw, and I cannot understand how that can be construed as an amendment of Article 3, (1) or (2) of the Warsaw Convention which is the only thing that controls us in this litigation.

MR. SINCOFF: Well, I must respectfully say, your Honor, that what I will present to you is the view expressed by the Courts, the rationale expressed by the Courts—

THE COURT: Well, they just slide over it.

They make assumptions that I find it very difficult to understand.

Then you come back and you talk about the function of the Court is to interpret the treaty and not to amend it.

MR. SINCOFF: Well, we didn't amend the treaty. **[17]** The airlines—

THE COURT: No, but I think the Second Circuit amended it.

MR. SINCOFF: The treaty was amended by the airlines with the approval of the Federal Government. It was supplemented by—

THE COURT: We are talking about treaties now. I'm not talking about any agreements.

The Montreal Agreement is not a treaty.

MR. SINCOFF: Conceded.

THE COURT: The Montreal Agreement never amended either the Hague or Warsaw.

MR. SINCOFF: Well, as to the Hague, that is not relevant as far as our—

THE COURT: It certainly did not amend Warsaw, did it?

The only thing that Warsaw said you could do is that if you failed to deliver a ticket, then Article 3, section (2), then the airlines subject themselves to unlimited liability.

MR. SINCOFF: Warsaw has another provision that says that the treaty can be changed by special contract and a special contract—

THE COURT: But as I pointed out to you, and I asked you a moment ago, where was the special contract? **[18]** What provision in the special contract at Montreal provided for the sanction against an airline that failed to comply?

MR. SINCOFF: And my answer to you then, and it still is, your Honor, that the Montreal Agreement has a special contract pursuant to the terms of the Warsaw Treaty which approves special contracts.

The Montreal Agreement specifically provided for the requirement of a notice printed in at least ten point type.

THE COURT: I understand that.

MR. SINCOFF: It did not specify the consequence of failure.

THE COURT: That is the point I am making.

MR. SINCOFF: Yes, your Honor.

THE COURT: The lack of that, which you grant to be very technical, if it is nine point nine nine, nine point five, then you get a question of de minimis. If it is 11 or 12 or as you said, as big as the walls of this courthouse, then everything is fine, but I find it very difficult how you can slide into a preclusion of limitation on liability from a failure to provide the ten point type.

MR. SINCOFF: The way I—

THE COURT: You know, it might take some people a fifteen point type to have meaningful notice. What you are actually saying is is that if they want meaningful notice, **[19]** then the airline is required to give everybody an eyetest to find out what they can read and to find out what they cannot read.

If you want a meaningful notice, then there should be provided a provision that before you can get on a plane, that you have to have a period of time in which you have the ticket explained to you because your rights are being severely jeopardized and like before we lock somebody up, we have to tell them about their rights so you know exactly what you are getting into.

It seems to me to be stretching it a fur piece, as they would say, but I do know that two Courts have stretched it that far and one, the Second Circuit.

MR. SINCOFF: Your Honor, if I might borrow your Honor's term about sliding into the sanction, the consequence of no limit, I would say that Lisi v. Alitalia did precisely that.

It is precisely in point to that issue.

Lisi involved a small warning printed on the ticket and it said, we are not going to allow an airline, a foreign airline, to use print of the size which is too small and when it delivers a ticket, and it indeed did deliver a ticket, and there is no dispute about that, but when it delivers a ticket with the warning which is not printed in adequate size, the Court said that the treaty provides for the consequence **[20]** of no damage limitation because, giving the warning in inadequate size print is the equivalent of delivering no ticket.

Physically a ticket was delivered and that's the way the Lisi Court construed the treaty.

Now, your Honor could debate and I think that there was—

THE COURT: What other construction is there anywhere else in the world that conforms to that? That is just the point I make.

If the purpose of a treaty is to have uniform application, then that construction leaves it up to every country to decide for itself whether or not there was a delivery of a ticket and the delivery of a ticket is a factual issue.

Pure and simple, Article 3 says that if you don't deliver a ticket and not if you deliver a ticket of an improper size, but if you don't deliver a ticket, that is the only reference as to this business, and if you don't do that, airlines, then you have given it up.

MR. SINCOFF: Well, I think, your Honor has brought me precisely to the point where I would say that because of your concern for uniformity, it is precisely for that reason that courts in the United States should construe this Warsaw Treaty in a uniform way.

You have the benefit of the Lisi case, the Lufthansa **[21]** case which said what the consequences would be and most importantly, you have the benefit of the Second Circuit in the Polish case giving you a framework of uniformity for you, I think, and I respectfully request that you accept the rationale.

The rationale for these three cases that the limitations basically and fundamentally are unfair but if you want the benefit of—

THE COURT: We are over and beyond that. We are over and beyond the fairness or the unfairness of the limitations. That was decided when we withdrew our denunciation of the treaty back in 1966.

MR. SINCOFF: Absolutely agreed, your Honor.

So the quid pro quo, the exchange, for the limit is the notice and that is the exchange. You get the benefit of the limit with the notice.

THE COURT: You can't point to a single discussion in any of the minutes of the Montreal Agreement that say that.

MR. SINCOFF: Well, your Honor—

THE COURT: Here we have got the best minds in air aviation in the country sitting around. We have all kinds of discussions. There was tremendous concern about this in the whole industry.

And nowhere in that discussion was there ever any suggestion that this was a quid pro quo **[22]** and I find that difficult to understand.

MR. SINCOFF: The language of the treaty precisely states, without any equivocation, that the failure to deliver a ticket had the consequences of denying the airline the limitation.

THE COURT: There is no question about that and that has never been changed to this moment.

MR. SINCOFF: We would also suggest to your Honor that 11 of the 23 cases which have moved for this relief of a declaration of liability without limit were commenced originally in the Eastern and Southern Districts of New York and Korean Air Lines asked that those cases be sent here. They have been.

THE COURT: I know that I am bound by the Second Circuit. 1407 says that but the rest of it I am not so sure that I am bound by.

I don't think that Lufthansa binds this Circuit.

MR. SINCOFF: Well, in Lufthansa, the Court specifically said that if you don't follow the requirements of the notice, you are going to be precluded from taking advantage of the limit. That is what the District of Columbia Circuit said and so I think that is very good guidance for your Honor to follow.

With regard to the cases that were not filed in New York, we think that the Polish Air Lines case makes **[23]** good sense because our Government was led to withdraw from its denunciation, to cancel the denunciation, and to continue as a party because of the commitments made by the air lines in the agreement.

That agreement was not just a piece of paper. It was formally approved by the Federal Government. It had the authority of law.

THE COURT: All I am saying is that even in the notice of withdrawal of the denunciation, our Government never said that we are satisfied now that Article 3, section (2) has in fact been amended to the point that we can hold the airlines on unlimited liability if they don't comply with the agreement that they entered into in Montreal. There is nothing like this in the whole discussion and that is what I find to be rather disconcerting.

MR. SINCOFF: What I would say to your Honor is this quite, quite fervently, that if you were to isolate the issue in that way without giving cognizance to the history, I could understand it but I think to ignore the history—

THE COURT: I am not ignoring the history. They fought out this business of the limitation of liability very clearly and that is why they spelled out what they spelled out. That is just the point I am trying to make.

MR. SINCOFF: Well, the Lisi case—

THE COURT: The history of this whole business **[24]** since Warsaw through Hague, through Montreal, indicates that having hammered out this question of limited liability with absolute fault, that is what they come out with, and if there had been anything that toyed with that, it would have been specified with great precision by them and that is the thing that disturbs me about the Montreal Agreement and the interpretation of the Second Circuit.

MR. SINCOFF: I would say this, to follow that line of reason, would mean that it would be free for the airlines to come in and say we are not liable without fault because the agreement doesn't—can't modify the treaty and the treaty gives us the opportunity to avoid all liability by coming into court and proving that we are not at fault.

So I would say that that would certainly be a position which would be untenable because in fact the agreement did change the rights, duties and obligation of the airline with regard to the treaty.

That Montreal Agreement cannot be—that agreement cannot be isolated from the treaty. It is part of the treaty because it imposes on the airline with its consent, with the airline's agreement, it imposes on the airline consequences.

The consequences can't be denied simply because the treaty stands alone unmodified.

THE COURT: The consequence of not complying with the treaty is that they can't fly. They can't be certified **[25]** to fly in this country.

The CAB says we will not authorize you to fly.

MR. SINCOFF: Well, what we say is that when Korean Air Lines gets that authority, as it did in 19- —

THE COURT: Whenever, they got it.

MR. SINCOFF: Well, a decade or more before this catastrophe, and when it got that permission, and when it signed the agreement, which it had done at the time it obligated itself to provide the notice because at that time and for the decade that followed, it was on notice by reason of Lisi and this Circuit's decision, that if it didn't comply with the minimum ten point notice, then the consequence would be no limitation and what is wrong with that?

If we, as the plaintiff, could prove culpability of Korean Air Lines, negligence, under ordinary principles, it would be liable for full damages and if our friends across the aisle desire to put us to the standard of proving negligence on the part of Korean Air Lines in exchange for recovering full compensatory damages, we would have no problem with that, your Honor, but what they wish to do is take half of the loaf without paying the price for the other half.

They want the damage limitation but they are not prepared to give the required applicable notice.

We say that if you forcefully assert the treaty, as they do, you pay the consequences when you fail to abide **[26]** by the conditions precedent that allowed you to conduct this very flight, and that is our position and I believe it is a sound one.

I would hope that the Court, feeling obligated as it does to follow the Second Circuit as to the New York cases, would recognize that for the sake of uniformity, cases filed in the District of Columbia, Michigan, throughout this country, should be accorded uniform treatment.

Thank you, your Honor.

MR. TOMPKINS: May it please the Court, my name is George Tompkins and I represent Korean Air Lines.

With due respect to the Second Circuit and to this Court's comments, I submit that this Court is not bound by the decisions of the Second Circuit on this issue.

This motion involves the question of Federal law involving a treaty of the United States and only the Supreme Court of the United States can render decisions that would be binding on any other Federal Court including this one.

The Second Circuit doesn't make that law and even the Second Circuit can't make its own mind up on what the law is. As we pointed out in our brief, during the development of the Lisi and Polish Air Lines decisions in the Second Circuit in the midst of that, another panel of the Second Circuit commented in the Stratis case which we have mentioned in our brief that only non-delivery of a ticket **[27]** under Article 3 results in the imposition of the sanction of absolute and unlimited liability.

THE COURT: What we have is constructive non-delivery. That is what the Second Circuit said.

MR. TOMPKINS: That is what has emanated from the Lisi case and I would point out that even the Second Circuit doesn't abide by its prior decisions in dealing with Warsaw Convention issues.

In the 1950's the Second Circuit held that the Warsaw Convention did not create a cause of action for wrongful death.

Some 20 or 30 years later, the Second Circuit, by the same author of the 1950 opinion, changed its mind and the author of the opinion said he was wrong in the 1950's and on rereading the treaty he concluded that it does create a cause of action for wrongful death and in those 30 years other courts in this country have followed the Second Circuit and now that the Second Circuit has changed its mind, some courts have said, well, we may follow and others have said we will and others have said we won't.

So even the Second Circuit isn't sure about its position on what the treaty means and I think that this Court is perfectly correct when it says that the courts have glided over the issue of what the treaty really means and that is the basic issue here. **[28]** I would submit, your Honor, that bad law remains bad law only as successor courts follow it without further examination of the underlying—

THE COURT: Of course, if it was that wrong, I find it difficult that they couldn't have gotten four votes on the petition for cert. because I think it is a major pronouncement as to the liability of the industry.

MR. TOMPKINS: The Supreme Court in the Lisi case, your Honor, granted certiorari in the case and heard oral argument. There were only eight justices who could sit on the case because

Mr. Justice Marshall had filed a brief on behalf of the United States in that case as the Solicitor General.

At the time of that argument, Mr. Justice Fortas asked was there any other country in the world party to the Warsaw Convention that had addressed the issue and I responded that no other court had yet addressed the issue and his response was, well, then we are free to interpret it as we see fit without running afoul of any interpretation in other countries that are a party to the treaty and the answer, of course, was yes.

Now there was a four/four split which results in an affirmance of the lower court but not a precedent from the Supreme Court and if you look at it that way, at least four of the judges on the Supreme Court agreed with our position.

[29] THE COURT: And it was two to one in the Circuit.

MR. TOMPKINS: That is correct, and I think that the position of the Second Circuit, it was two to one on the panel on the Lisi case and six to three on a petition for rehearing en banc and I think that the theme of the case and the entire development of that rule of law of the Second Circuit in the Lisi case is found in Judge Moore's dissent.

The Second Circuit doesn't like the limitation of liability and they made it clear for many years and in the Lisi case they rewrote the treaty to suit their dislike of the limitation and I submit that what Judge Moore said in 1963-64, whenever the decision was handed down, was correct and remained the theme in the Second Circuit today until perhaps some day in the future, as I continued to try to persuade new panels, they may change their minds.

I submit that in our brief we have set forth all of the arguments that should cause this court on re-examination to reject the Lisi case and before 1929 it was proposed that Article 3 of the Warsaw Convention contain a sanction of absolute and unlimited liability, not just for the failure to deliver the ticket, but for the failure to contain the statement as to the applicability of the Warsaw Convention. It is not a notice. It has never been a notice and even the Montreal Agreement isn't a notice. It says advice.

The Warsaw Convention says statement.

[30] In 1955, however, the United States wanted a notice and the 1955 Amendment to the Warsaw Convention, known as the Hague Protocol, contains a provision that would require a notice.

The Supreme Court of Canada—

THE COURT: What is the sanction provided if the notice wasn't—

MR. TOMPKINS: If the notice—if the ticket delivered did not contain the notice, then the sanction was the same as if no ticket was delivered in the Hague Protocol.

THE COURT: That was spelled out.

MR. TOMPKINS: It was spelled out but not in the type size. It was spelled out as a statement.

THE COURT: That is what I am talking about. That is what concerns me about this construction of the Second Circuit.

With all of you lawyers sitting around at these conferences, you and your predecessors, it seems to me that an issue as important as this, you see, as to when you extend the principal issues of the conference and nothing was said about this. This is just mind-boggling.

MR. TOMPKINS: Prior to 1929 in the Convention leading up to adoption of the Warsaw Convention and the conferences, it was thought that the sanction for the failure to contain the statement was too harsh. That has never **[31]** changed in the eyes of the people who draw these agreements up.

As you pointed out, your Honor, and as we pointed out in our brief, the position of the Lisi case is illogical.

A blind person with twenty point type is bound by the limitation of liability but a person, a Rhode's Scholar, with a Ph.D., and with 10/20 vision, gets a notice or advice or statement in less than ten point type isn't bound by the limitation of liability. The position is illogical.

When the Lisi case was before the Supreme Court of the United States there was not a decision in another party country to the Warsaw Convention on the issue but since then there has been, in Canada, which is our closest neighbor dealing with the Warsaw Convention cases and I notice it will be a close neighbor to this courthouse this year, but the Ludecke case decided that in a Warsaw Convention case, only non-delivery of a ticket

results in the sanction of absolute and unlimited liability and if that ticket does not contain a ten point type statement, a twenty point type, a five point type or no statement, the limitation still applies because the treaty says the sanction applies only for non-delivery.

However, the same Supreme Court of Canada said, with the Hague Protocol case, the result is different because the Hague Protocol amended that article of the Warsaw Convention to provide that if the delivered ticket does not contain **[32]** the statement then the sanction does apply and there was the difference.

The United States has never adopted the Hague Protocol because the limitation is too low. It is not the law of this country as to cases in this country involving transportation to and from this country. Now, the court pointed out the importance of uniformity.

Mr. Sincoff points out that it should be uniformity throughout the United States but that is not the law when you are dealing with a multilateral treaty. The objective is uniformity world-wide and here is the Supreme Court of Canada rejecting the Lisi case as contrary to the intent of the party to the Warsaw Convention.

Nine governments at the time of the Lisi case when it was before the Supreme Court advised the Supreme Court through briefs and through diplomatic notes that the Second Circuit decision was contrary to their understanding of their obligations under the Convention with the United States.

I submit that the Lisi case should be rejected as bad law and I submit that some day it will be.

I would like now, if your Honor, to address the first part of Mr. Sincoff's remarks on the partial summary judgment motion, but I want to be certain that I am absolutely certain that the plaintiffs no longer argue that the Warsaw Convention does not apply to all of these cases and I want **[33]** to know if I am correct because I have a lot of briefs that argue that Korea is not a party to the Convention and therefore Korean Air Lines should not be entitled to any of its provisions.

You have changed your position.

MR. SINCOFF: Would you like me to respond to that?

MR. TOMPKINS: Well, you said that it is not disputed that the Warsaw Convention applies to all cases.

MR. SINCOFF: George, my position and the Plaintiffs Committee's position is and always has been that the Warsaw Treaty alone doesn't determine this case. It is the Warsaw Treaty in combination with the Montreal Agreement, the foreign air carrier permit and the federal regulation, and all of those things determine the issue.

What you desire to do is isolate it to the Treaty and we disagree with the isolation.

MR. TOMPKINS: I am no clearer now than I was before.

THE COURT: Yes, I know the point that was made. I know the shift in position.

MR. TOMPKINS: The foreign air carrier permit is quite clear and it required Korean Air Lines to file a counter-part to the Montreal Agreement and, of course, that has been done and that is the limit of the requirement in the foreign air carrier permit.

[34] I submit that the foreign air carrier permit has really nothing to do with the issue before the court.

Addressing myself to the motion for partial summary judgment of $75,000, I respect Mr. Sincoff's opinion on the value of the cases as he believes it to be sometimes. I argue with him sometimes but many times we compromise our positions. But of the proof submitted in support of the evaluation in the cases by the plaintiffs moving for partial summary judgment, 28 are lawyers' affidavits.

Simply stated—

THE COURT: I don't think we need belabor that. I don't think there is any justification for it. It sounds good but I have no intention of doing that.

MR. TOMPKINS: I will merely point out, your Honor, that the Supreme Court presently has before it for decision and the case has been argued, the question of whether prejudgment interest is recoverable in a Warsaw Convention case and the issue about ordering us to deposit moneys so it can draw interest, I suggest that should not be addressed until the Supreme Court has acted.

If the Court feels that the length of this case through a trial with respect to the question of damages and possible appeals is a particular problem, I would suggest you consider adopting a procedure which we suggested to Judge Hatter in the Central District of California in another **[35]** Korean Air Lines accident whereby the questions of damages were tried first, non-jury, so that the judgments were entered and interest could run on those judgment from the day of entry of the judgment pending the ultimate resolution of liability.

He adopted that procedure and we have had non-jury damage trials. We have not had a liability trial yet to determine whether the plaintiffs are entitled to any money or more than the limitation of liability but it was a procedure that—

THE COURT: I do not think that we are at that juncture yet.

MR. TOMPKINS: Very good.

THE COURT: I don't think we are there yet. We will worry about that and all of those trials won't be here anyhow.

MR. TOMPKINS: Very good, your Honor.

THE COURT: I don't know that the Multidistrict Panel will put it on this Court. They will be farmed out to wherever they came from and you will have to approach each Court and settle it on the procedure when we get beyond the liability phase of it.

I want to move the liability aspect because I think some of the things that I do you will want to appeal.

MR. TOMPKINS: I will rest my remarks on our brief, your Honor.

Thank you.

[36] THE COURT: I think the question that was asked, Mr. Sincoff, insofar as Korea is concerned, I think the law is clear that the Republic of Korea is in a treaty relationship with the United States through the Warsaw Convention and the Hague Protocol.

He was asking you whether you take the position that it is or is not.

MR. SINCOFF: Well, my position is that with regard to these particular two motions, your Honor need not determine that question.

I can tell you that there is a plan—the reason I say that it is not necessary is, number one, Hague is not relevant to this motion because the United States is not a party to it.

As to Warsaw, we concede that the Warsaw Treaty applies to these cases, and there's no doubt about that.

What we say is that we don't request nor do we think your Honor should decide the issue about treaty relationship at this point in time because as to other cases that are filed in this Court which are not parties to the motion, that issue is going to be the subject, I believe, of some—

THE COURT: Well, we have several things mixed up because unless the republic of Korea is in a treaty relationship vis-a-vis the United States, we have the problem **[37]** of what are the cases doing here? What is the jurisdiction of this Court?

MR. SINCOFF: And my answer is—

THE COURT: I would assume that with respect to the New York plaintiffs that it is clear that the people who bought tickets in New York from a Korean Air Line officer, over those parties, we have treaty jurisdiction.

MR. SINCOFF: Yes, your Honor.

THE COURT: Now, we have that treaty jurisdiction why?

MR. SINCOFF: By reason of Warsaw alone and the same is true of all 52 cases no matter where they are filed because what we consciously did, your Honor, with regard to these 52 cases, is that we selected only those cases which were clearly governed by Warsaw independent of any other treaty.

The reason—the relationship—

THE COURT: What are the provisions of Warsaw alone without regard to Hague that give this court treaty jurisdiction.

MR. SINCOFF: I believe it is clear and I don't believe there is a dispute about it and that is as to all 52 of these passengers, the literal terms of the Warsaw Treaty apply because, for example, the ticket was purchased in the District of **[38]** Columbia for a flight from the District of Columbia to New York to Korea and back to the United States and even if we were not in a treaty relationship with Korea, that round-trip ticket is governed by Warsaw, so what we say as to these 52 cases is that your Honor need not decide and therefore we urge you not to because it will be the subject of other cases.

These 52 cases are clearly governed by Warsaw and we concede that. There is no issue about it.

If there is no treaty relationship with—

THE COURT: You say you are bound by Warsaw and Warsaw alone. Is that what you're saying?

MR. SINCOFF: We say you are bound by Warsaw without Hague but supplemented by the agreement, the Montreal Agreement.

Jurisdiction of the court rests upon Warsaw. Now, the legal obligations of the parties are not confined just to Warsaw. The legal obligations can be more pervasive than the jurisdictional concept and that basically is our position.

The reason I urge Your Honor not to decide the treaty relationship issue is this: There are other actions that have been filed in this Court and elsewhere which are before the Court aside from the 52 and where the tickets were not purchased in the United States or if they were purchased in the United States, there is a question as to—

THE COURT: Destination?

MR. SINCOFF: Yes. And so consequently that will **[39]** be the subject of a very knotty problem.

I hope I have answered your Honor's question.

THE COURT: You have. Thank you.

Is there anything else that you wanted to say in rebuttal?

MR. SINCOFF: No, I am happy to rest.

THE COURT: Does anybody else have anything else they want to argue with respect to this motion?

(No response.)

THE COURT: We have had this problem involving Boeing and Litton in discovery.

Are the Boeing and Litton representatives here?

MR. TOMPKINS: Your Honor, do you intend to hear argument today on the Article 28 motions?

THE COURT: I will hear it if you are prepared and you would like to.

MR. TOMPKINS: Because that relates directly to the question and I can't seem to get an answer from Mr. Sincoff, that is that either the United States and Korea are in a treaty status or they

are not. I think that is the issue that the Court has to address in the Article 28 motion.

THE COURT: He wants to confine it to the Article 28 motions.

I did not indicate in my notice that we were going to have argument on that but if you are prepared, I can **[40]** certainly take a short break and then come back.

MR. TOMPKINS: I am happy to leave that before your Honor on the papers.

THE COURT: I think that it can be decided on the papers.

MR. SINCOFF: Yes.

THE COURT: I will try to move on those. I did anticipate that you would have some discussion about this discovery business.

Are you prepared to go into that now? Let me hear the position that you expressed in your motions.

I am willing to reconsider my first pretrial order. I think that is in essence what the plaintifffs want and so you want it, why don't you start off?

MR. SINCOFF: Your Honor, may I interrupt for a moment?

THE COURT: Surely.

MR. SINCOFF: Concerning your comments about the Article 28 motions, I was not referring to those. They deal with a few cases and what I was trying to say, your Honor, that there are other cases—

THE COURT: I know. There are all kinds of cases. We are going to have to have a chart. I knew what you were speaking of.

I am not really as confused as I sound. I have **[41]** read your papers but just sometimes it doesn't come out right.

MR. MADOLE: My name is Madole from Speiser, Krause & Madole, Co-chairman of the Plaintiffs Steering Committee.

On the issue of discovery, your Honor, February 8 after discussion with the various counsel for the defendants, I sent them a letter which has been the form that we have used throughout to notice discovery.

That letter was not uniformly received as good news by counsel for all of the defendants. I was advised by the defendant, the United States, through their counsel, that they were going to move for a protective order.

I was advised by counsel for the Boeing Company that I had not properly read the Court's order. I was advised by that defendant, that is, the Boeing Company, through their counsel, that they would not—that they would resist the depositions of Boeing Employees.

The protective order that I was advised that the United States Government was going to move for, that simply has not happened yet.

Yesterday afternoon, late afternoon, Mr. Dombroff called me and gave me some indication that we might be able to work out our problems with the defendant, the United States, and as a practical matter, your Honor, what the United States says was, why don't we do our discovery by a **[42]** different method?

Why don't we use interrogatories rather than depositions? I pointed out to the defendant, the United States, that when they recommended this some months ago, that on October 29, I provided them with the first set of interrogatories and as of the date of our discussion on the 15th, those interrogatories had not been answered at all.

When we did get the answers, your Honor, we find that the radar data and tapes from the two coastline radars no longer exist.

We are prepared to argue now, your Honor, on the reasons for asking for the discovery that we have asked for. The main thing we are after, your Honor, is a clear direction by this Court to all counsel that the route of flight of this aircraft is a relevant topic of discovery.

One of the problems has been that the defendant Korean Air Lines, the defendant the United States of America, Boeing defendants, when we go into the issue of the time and place where the aircraft was based on the ICAO data, we are spending an awful lot of time with a lot of speeches on the record and these very people, and these are the people that we have named, that for the United States government, for Boeing and for Litton and for Korean Air Lines, they actually participated in the activities of ICAO in establishing the flight path.

[43] We have all sorts of statements from the United States government, the Administrator of the FAA, that Flight 7 was

tracked for two and one-half hours and we tracked the Russian's tracking the airplane to its accident location.

Now, we believe this is completely irrelevant, that is, the flight path of this aircraft.

In all of the interrogation that has gone on so far with government witnesses, and I include the people that worked for the North American Air Defense Command, not once has any interrogation by the Plaintiffs Steering Committee been objected to because of security information. We are not asking for security information.

What we are asking for is a basic type of evidence used in an air crash case, that is, the flight path.

We are prepared to argue in detail on any of these. We asked for this hearing, your Honor, because we were told that a protective—motions for protective orders would be made. They have not been made.

THE COURT: I do not think they are going to be needed, either.

Does Boeing want to respond?

MR. MC LAUGHLIN: It is Boeing's position and I think the Court is in agreement in light of suggesting that it was the plaintiffs' burden to come forward on this and that the existing Court Order is a clear protective order **[44]** barring all discovery against Boeing until resolution of its dispositive motion.

The plaintiffs have already made a motion to permit discovery against Boeing and Litton and Boeing has filed its opposition to that.

I think it has stated numerous sound reasons and court precedents for why a continued stay of discovery, postponement of discovery against Boeing, is appropriate at this point until—

THE COURT: What is not appropriate is continued unresolution of the motions and so I am going to get on that.

MR. MC LAUGHLIN: We would appreciate that and I'm sure all parties would.

THE COURT: With respect to Boeing and Litton.

I don't know why your filed a motion for partial summary judgment against the motion to dismiss. I don't quite understand that. That puts me in a difficult posture.

I think the legal issued raised by your motion is one that ought to go on to the Court of Appeals.

MR. MC LAUGHLIN: It is our position that there were some facts such as the regulations governing interception, et cetera, that were outside of the pleadings and that summary judgment was the appropriate way to go and there were cases including one that you yourself had issued a ruling on that were summary judgments on the superseding cause issue **[45]** and if ever there was a case where summary judgment on superseding cause was appropriate, this was it.

Unless the Court has any questions, that is all I have to say.

THE COURT: No.

MR. MC LAUGHLIN: Thank you.

MS. VON FLATERN: Jan Von Flatern on behalf of the United States.

Your Honor, the reason that the Court has not seen a motion for protective order is in part the conversation that Mr. Madole referred to with Mr. Dombroff during which Mr. Madole indicated that he would give us, I believe on Monday, a letter which laid out in some detail exactly what he was looking for and why it was that he was asking for the specific witnesses.

It is not—I was not a party to that conversation and I am relying on Mr. Dombroff's report of it but with respect to a couple of Mr. Madole's comments, I think that they need to be answered.

One is that upon receiving the interrogatories, we learned for the first time that the radar data in question had been destroyed.

Your Honor, that was a subject of testimony back in October and November.

The radar data being referred to was just Air **[46]** Force data—air defense data which is recycled every 15 days. The tape on which it is kept is recycled every 15 days and after some specific effort to preserve, Mr. Madole and everyone else was told that such preservation had not taken place because within 15 days of this incident, the Air Force, the regional operations control center, had no idea that it was going to be involved or that that data would be useful in the litigation at any point.

Further the question as to whether—what the flight path of this airplane was and where it ended up is indeed relevant and neither the government nor any other defendant that I am aware of ever disputed that.

We have produced and I would represent to the Court that it has been represented to Plaintiffs Steering Committee that the government has produced everything it has on that subject.

The witnesses who have been requested almost without exception have nothing but nothing to do with it.

They have asked for a couple of air traffic controllers who are not radar controllers and we have agreed to produce them and they have asked for an Air Force officer whose superior has testified, the man who ran the regional operations control center or did so at the time, has testified about the purpose of the radar surveillance and in fact outbound aircraft such as 007 would have been are not monitored **[47]** or were not particularly at that time.

They have taken the deposition of the duty officer, the man that was actually there that night who said the same thing about the purpose of the monitoring and also said, I didn't see anything. If I had seen anything, I would have reported it to the senior director.

Now, they want the middle man. They know from the director of the whole unit what the purpose is and they had the man who was actually there, but now they want the middle man.

It is those kinds of requests that we don't see the purpose of and that require the transport of people from halfway around the world to get them here, or I guess conversely, the transport of all of us up there. But in either case, it is grossly wasteful.

What we have requested and the basis for the objection which yet may turn into a protective order, although I sincerely hope we can avoid that, is that they do some of this stuff by interrogatories, by requests for admissions.

They want a Coast Guard officer whose signature stamp happens to be on the promulgation of the search and rescue plan, and anyone who knows anything about the bureaucracy knows that the man will probably come in and say, yes, that is my signature stamp.

They have not asked us to admit to the authenticity **[48]** of the document which we would certainly be prepared to do.

They have not asked us to admit to the purpose that is laid out in that document which we would be prepared to do.

We just don't want this man to be brought in and taken off duty and sit there and say, yes, that is my signature.

So we have asked that the request be narrowed, that they be made more specific as to what they really want to do and not that they have any further discovery.

As I said, we are going to produce the two controllers on the data requested and we are trying to find one other witness who has been asked for by description, although we have not had much luck with that.

I am hopeful that Mr. Madole's efforts to make more specific his directions will enable us to work it out and that a protective order will not be necessary, but I do want the record to be clear that the government is not taking the position that anything that has to do to where this airplane actually went, how it ended up where it did in terms of the flight path is anything that we are trying to withhold. We are not.

I believe at the time of the government's motion for summary judgment the Court indicated that it understood that there may be things that will never be known and I do not intend to imply by that expansive statement that at some **[49]** point there might not be a national security concern that would have to be raised but as Mr. Madole said, they have not come up yet.

We have given them everything we have.

MR. MADOLE: May I respond?

THE COURT: Yes, you may afterwards.

MR. MC QUILLAN: Your Honor, my name is McQuillan. I represent Litton and from the receipt of Mr. Madole's letter, the proposed schedule listing witnesses to be deposed, one of whom was a Litton employee.

I contacted Mr. Madole and I do not wish to misrepresent anything that Mr. Madole said but it was my understanding that the result was, the telephone conversation was, that if I agreed to produce the one Litton employee listed, that that witness would not thereafter be recalled following any document production by Litton.

I trust I am not misrepresenting our telephone discussion. If I am, then our position is that we will not voluntarily produce this witness.

Mr. Madole and I discussed the question of the Litton document request that was served about a year or so ago by the Plaintiffs Steering Committee which has been stayed as a result of the pretrial Order.

It appeared to me that if my understanding of Mr. Madole's telephone conversation with me that this witness **[50]** would not be recalled following any production by Litton, that the entire document request addressed to Litton was just a listing of papers that he would like to have but he doesn't need and that we might just as well forget about any document production by Litton.

All he wants is one witness to testify to something that he allegedly did with ICAO which is another point, but that he really didn't need any of the documents that he had requested that Litton produce.

Now, with respect to that one witness, Mr. Madole stated this morning that at least with respect to the Litton man, and I believe he included some Boeing people, that this witness actually participated in establishing the flight path with ICAO.

Now that is simply not true. It's a misstatement of fact. The witness was present when certain simulated flight paths were run on the Boeing simulator at the request and under the direction of ICAO and at best, these are hypothetical flight paths.

They are not by any stretch of the imagination a recreation of an actual flight path flown by this airplane.

I don't think that Mr. Madole upon reconsideration would suggest that this or these were the flight paths. Actually, there were three different paths, and I don't know which one he is talking about. All three of these were **[51]** hypothetical and our position was and still is that if my understanding of Mr. Madole's conversation with me is correct, we will produce our witness but that he will not be recalled even if your Honor denies our motion and document production goes ahead.

Failing that, we will oppose the production of this witness at this time in this so-called second round of depositions that have been scheduled by the Plaintiffs Steering Committee.

MS. VON FLATERN: Your Honor, excuse me. I have been advised that I misspoke myself, and I mixed up the air traffic service and the Air Force. Actually, the radar tapes are only kept for 30 hours and not for 15 days.

THE COURT: In any event, we don't have them.

MS. VON FLATERN: We do not have them.

THE COURT: And we have not had them since shortly after the accident.

MS. VON FLATERN: That is correct.

THE COURT: Mr. Madole?

MR. MADOLE: You Honor, as to the defendant, the United States, it is certainly correct that Mr. Dombroff said to me on the telephone about 4:30 yesterday afternoon that if I would—if I would provide him with a letter setting up the details, because I had just gotten through explaining to him why his motion for protective order would not be well received as to the controllers, he agreed to bring the controllers in and I started to explain the rest of it, and he said if he could have a detailed letter by Monday that probably they would not file a motion for protective order.

Now, just so it is clear, your Honor, we have exhausted most of our negotiation leeways.

The United States government is trying to tell us that there is a better way to conduct discovery, and they are suggesting that we use interrogatories.

When we tried that, they lost the interrogatories for four months and when we finally got the answer, we found that, yes, documents were destroyed.

Now, as to Litton, Exhibit 64 produced by the United States government—pardon me, this is produced by Korean Air Lines—showed the team that participated both with ICAO and with the Korean government investigation team. Mr. Richard Parron, the project engineer, Exhibit 199, shows that all of the simulations that were made for ICAO so that ICAO could come up with a flight track, Mr. Parron participated as the expert on the Litton 72 inertial navigation system.

Based on those technical studies, Korean Air Lines, the United States government, ICAO, have come up with a probable flight path.

This really harkens back to the days, your Honor, when we didn't have flight data recorders and we proved by **[53]** circumstantial evidence where it was appropriate the flight path of an aircraft.

Here we know that this was an aircraft that was being controlled by a computer device and this computer device was built by Litton and the man that Litton sent to participate in this activity of this building the circumstantial evidence, that often is all we have to use, and the two men from Boeing are also the men, and it was Boeing where the simulation was actually done.

So I do not for a moment concede to Litton or to Boeing that the Court's Order prohibits these depositions. It specifically talks about document discovery. That's the title of the paragraph they cite which they didn't find important enough to put the title of that paragraph in the motion papers that they gave this Court and that is why we took the position that since we already have documents from Korean Air Lines and the United States government that show the activities of these individuals, the Court has just heard one of the best, I think, arguments for this discovery.

You got counsel for Litton saying no one will ever know—may ever know where that airplane went.

Now, your Honor, I submit that as an officer of this Court and the responsibility that this Court gave us when they appointed the Plaintiffs Steering Committee, we have an absolute duty to ascertain as close as we can within **[54]** the law and within the requirements of our practice the path that that aircraft took.

Counsel for the United States says why do they ask for Mr. Knapp. Mr. Knapp, your Honor, signed the search and rescue procedural order that called for any employee of the United States, whether they work for the Air Force or the Navy, the Department of Transportation or the Coast Guard, that any time they observed an aircraft in a position of peril or heading for a position of peril, that there was a duty to notify the search and rescue coordinator for that area and that area, your Honor, stretched from the coast of Alaska to the Kamchatka Peninsula, the entire area where this aircraft went off course and went towards its position of peril.

In that order, and not only that order but other documents produced by the government, they show that there was a whole flurry of activity about the Pacific region.

New search and rescue plans came out in the spring of 1983, new coordination programs between the Air Force, the FAA, the Coast Guard, for the particular area.

Yes, we have asked for the man whose name is on the order that requires direct line communication from the RCC, that is the regional control center to the FAA.

We have had some testimony and we had testimony from FAA controllers, from the director of air traffic control for the Anchorage region and from the colonel that had duties **[55]** related to monitoring with the Air Force and none of them know anything about the national search and rescue plan.

It is that plan that was signed by the Secretary of the Air Force, the Secretary of Defense, the Secretary of Transportation, back in 1981 and when in that plan in was said that in, amongst other places, in the specific region, in the oceanic region, which is that area where this airplane flew through that there was a duty on the part of any government employee, whether he worked for the Air Force, the Navy or the Department of Transportation, that if they saw an aircraft heading for a position of danger, that there was a duty to take the steps to warn and there was a procedure set up in these various government documents.

We want to see if that procedure was implemented, your Honor, because there is a line of cases that says that if it was supposed to be done and wasn't done that that raises liability.

I think that I have responded to the United States and to Litton. If the Court has any questions, I will be glad to respond to them.

THE COURT: Well, I think the observation was made that in seeking answers, for example, to this last question, you could probably ask for about 100 people and they could just go on and on. I don't know. I think it was. Maybe it was. I think Joe did it. I am not sure and you go **[56]** through deposition after deposition.

I think it was suggested that one way to find out is, was the plan implemented? When? Who had the authority to do so? Who did it? And then you can get the people.

MR. MADOLE: Your Honor, there is no question in my mind that the plan was implemented.

THE COURT: Well, that is what you said you need to know.

MR. MADOLE: What I am saying is that the method of implementation between the Coast Guard—

THE COURT: Ask them what it was supposed to be and by whom it was implemented. When was it implemented? Then you begin to pinpoint it and then they say Joe in the Coast Guard was supposed to do it. He had the authority and then you can notice him.

MR. MADOLE: Your Honor, I would submit that we could do that faster in one day of depositions than we can in a year of interrogatories, and the interrogatory comes in and it gets staffed and then it goes through—well, your Honor knows.

THE COURT: Well then don't do it by way of interrogatories. Request for admissions would do the same thing, wouldn't it?

I am concerned about only one thing. Let me put this in perspective for you again.

[57] There isn't any question, any doubt, that we have got to find out all we can short of violating military secrets to see about what happened to that airplane on September 1st, 1983.

There isn't any doubt in my mind that everybody in the present context of this litigation is entitled to use all reasonable efforts to find out where it went and more importantly, if we can, why it went where it went.

Now, that is what we are trying to find out, where it went and why it went there because the why determines who is going to be in this case as defendants besides KAL. They can't get out. They are here. They are stuck.

Boeing, Litton, the United States, no, not yet, although Litton and Boeing may have put some legal arguments to us.

I thought it was clear, and we have not had any problems up to this juncture so far as I now, that that is what we were going to focus on.

The government had the facilities, and they had the basic data because of whatever control they had at Anchorage so that is where we started our discovery. Isn't that correct?

MR. MADOLE: That is correct, your Honor.

THE COURT: Now, it develops that other discovery is related to that. That is where we are at this juncture **[58-59]** and I think that all Boeing and Litton is saying really is that before we go through this next thing which they know is coming, I ought to get off my decisions on the pending motions.

They have got their fingers crossed and they might get lucky. They are hoping against hope.

If I go one way, you go to the Court of Appeals and I would certify it immediately.

If I go the other way, you would just go ahead with your second phase of discovery.

I will rule on those motions as quickly as I can, that is, Boeing's motion for partial summary judgment and Litton's motion to dismiss under 12(B) on the superseding cause. That is a very interesting legal question.

The government has not filed anything yet. They will come along a little later, I guess.

I am not suggesting that you need to go any particular route. I think you are experienced enough to know what you have to do based on what you have already done and look, these government people can get all around this world in 15 minutes for anything else so they are just going to have to get around the world for this case because the implications are fantastic and there is a substantial liability in terms of the whole thing, so we are just going to have to bear that expense.

[60] I have to have confidence that you are not going to do unnecessary crazy things. I think you have better things to do with your time and it is a fact that representing, as you do, the number of people that you do, and representing them through their other counsel, you have a tremendous legal obligation vis-a-vis what your ethical responsibilities are as lawyers.

You know, it is all right for me to be second guessed but it is a different thing for you as practicing lawyers to be second guessed by every lawyer in the country who thinks he is an expert because he has a couple of clients.

I am not going to put you in that position. I know exactly what you are going through and I have had no indications to date that anything you have done has been done out of anything except what has been in your judgment what is necessary to move this case along.

I will bear my share of the blame for any delay that has occurred but there are some things that I have to puzzle with.

I don't have all the expertise that you have. I have to acquire it. You all are specialists and that is part of the problem and maybe one day we will have a special court only for air disasters where you will have on the court people who know all this and who have been to the Hague and to the Warsaw and every place else.

[61] MR. MADOLE: Your Honor, technically, we don't have the motion for a protective order.

THE COURT: No.

MR. MADOLE: I want to assure the Court that we will do our best to work this out with the government but it seemed appropriate for the Court to know what we are trying to do.

THE COURT: I can understand and I make these statements as I do to let you know how I feel about it and the approach that I'm going to take if it hits the fan.

Any lawyer can file anything in this case that he thinks is appropriate and I will deal with it with all deliberate speed.

You know what that has meant in the past and that one has not been reversed yet.

MR. MADOLE: I would suggest to the Court that the Court's statement about the consideration that has been given to these questions, intricate questions of law, and there are those of us who have practiced in this field for a couple of decades, at least, and we are still puzzling over the same questions.

THE COURT: I have read articles and opinions on both sides, back and forth, and you all have participated in some of them.

[62] MR. MADOLE: That is all I have to say if the Court has nothing further.

THE COURT: I am still puzzled by the opinion from the Second Circuit.

Is there anything else that we can do, any other matter?

(No response.)

THE COURT: Let's see. I did have a list. Did you indicate that you wanted argument on your motion for default? Do you want argument on that?

I do not want to ever preclude argument, and if you want to argue that and your motion under 28, I will set it down and we can agree on another hearing date.

MR. MADOLE: Your Honor, there already has been argument on the Article 28.

THE COURT: Yes.

MR. MADOLE: As to the motion for default judgment against the USSR, with a sense of fairness and frankly because the liaison counsel, my law partner, wrote the motion, I think we are ready to stand on the papers.

I am not sure that the Russians would show up to argue against it anyway.

THE COURT: I have to decide whether the Russians are even here, you know.

MR. MADOLE: Yes, sir.

[63] THE COURT: You ran into Toskin but I have not seen him yet.

MR. MADOLE: The Plaintiffs Steering Committee is willing to submit that motion on its papers.

THE COURT: That is the real question. Are they here?

MR. MADOLE: Yes. If the Court wants argument—

THE COURT: No, I enjoy listening to you argue but I don't want it necessarily, but I just don't want to deny you the opportunity if you believe you need it.

So that is another one that I will try to get out.

MR. MADOLE: I believe Article 28 has been argued, your Honor.

THE COURT: Yes, you are right.

MR. MADOLE: Unless other parties want it, the Plaintiffs Steering Committee does not make that request.

THE COURT: Do I have anything else?

All right, that will be all then. Thank you.

(Whereupon, the hearing was concluded.)

Certificate of Reporter

This record is certified by the undersigned to be the official transcript of the above-entitled hearing.

/s/ Dawn T. Copeland

Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL. NO. 565
MISC. DOCKET NO. 83-0345

CIVIL ACTION NOS. 83-3448, 83-3450, 83-3454, 83-3457, 83-3458, 83-3459, 83-3463, 83-3465, 83-3466, 83-3469, 83-3470, 83-3473, 83-3792, 83-3890, 83-3898, 83-3902, 83-3903; 84-0029

Filed Sep 24 1985

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1985

CERTIFICATION FOR APPEAL UNDER
28 U.S.C. § 1292(b)

I certify that the issue disposed of by this Court's Memorandum and Order of July 25, 1985, which held that Korean Air Lines is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets, involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: September 23, 1985

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982—September Term, 1985

Misc. 83-00345

Filed April 8, 1986

In Re: Korean Air Lines Disaster of September 1, 1983

Plaintiffs' Steering Committee,

Appellants

BEFORE:

Scalia and Buckley*, Circuit Judges
McGowan, Senior Circuit Judge

ORDER

Upon consideration of Plaintiffs' Steering Committee's Petition for Leave to Appeal Pursuant to 28 U.S.C. § 1292(b), the response and reply thereto, and the Motion By Petitioners To Expedite Determination of Petitioners' Leave to Appeal Pursuant to 28 U.S.C. § 1292(b), it is ORDERED as follows:

1. The motion to expedite determination of the petition for leave to appeal is granted.

2. The petition for leave to appeal pursuant to 28 U.S.C. § 1292(b) is granted. The district court has properly found that

* Circuit Judge Buckley did not participate in this order.

the requirements of 28 U.S.C. § 1292(b) are satisfied, and wise exercise of our discretion dictates that the appeal be allowed.

3. The following briefing schedule shall apply.

Appellants' brief and record excerpts	May 7, 1986
Appellee's brief	June 6, 1986
Appellants' reply brief, if any	June 23, 1986

4. The Clerk is directed to transmit a certified copy of this order to the district court pursuant to a Fed. R. App. P. 5.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982—September Term, 19

C.A. Misc. 83-00345

Filed April 8, 1986

In Re: Korean Air Lines Disaster of September 1, 1983

Plaintiffs' Steering Committee,

Appellants

ORDER

It appearing that an order was entered this date granting leave to appeal to 28 U.S.C. § 1292(b), it is

ORDERED that the Clerk of the District Court, upon payment of the docketing fee, shall certify and transmit to this Court a preliminary record in the above-stated docket number.

For the Court:

George A. Fisher, Clerk

By: /s/ CATHERINE BATEMAN
Catherine Bateman
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982—September Term, 1986

Misc. 83-00345

Filed January 30, 1987

In Re: Korean Air Lines Disaster of September 1, 1983

Plaintiff's Steering Committee,

Appellant

Before:

Ruth B. Ginsburg, Stephen F. Williams and
D. H. Ginsburg, Circuit Judges

ORDER

This interlocutory appeal from the district court's denial of plaintiff's motion for partial summary judgment was taken pursuant to 28 U.S.C. § 1292(b). Because we are unable to determine the precise scope of the district court's order denying plaintiffs' motion, we hereby remand the record in this case for clarification.

The civil actions consolidated in this appeal were transferred to the district court by the Judicial Panel on Multidistrict Litigation for pretrial proceedings pursuant to 28 U.S.C. § 1407(a). The cases can be grouped into three categories on the basis of the fora in which they were originally filed and to which they

are to be remanded at or before the conclusion of pretrial proceedings, unless the actions are earlier terminated: (a) the Southern and Eastern Districts of New York; (b) the Eastern District of Michigan and the District of Massachusetts; and (c) the District of Columbia. The district judge, in his order denying plaintiffs' motion for partial summary judgment, did not expressly consider the contention that, by analogy to the principle set forth in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), he was bound by Second Circuit precedent in resolving the claims of plaintiffs in the first category enumerated above.

The extent of a transferee court's authority under 28 U.S.C. § 1407 independently to resolve issues of law already passed upon by the federal court of appeals for the circuit in which the transferor forum is located is apparently a question of first impression, and our consideration of this issue is hampered by uncertainty as to which plaintiffs were covered by the district court's July 1985 order.* Accordingly, we remand the record so that the district court may clarify the reach of its ruling.

Nothing in this order shall in any way preclude the district judge from continuing to superintend consolidated pretrial proceedings in these cases under the authority granted in 28 U.S.C. § 1407(b).

Per Curiam
For the Court:

GEORGE A. FISHER, Clerk

By: /s/ PATRICIA L. CHATMAN
Patricia L. Chatman
Deputy Clerk

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* Concerning the cases filed in New York, the district judge observed at argument of the motion for partial summary judgment: "I know that I am bound by the Second Circuit. [Section] 1407 says that, but the rest of it I am not so sure I am bound by." Joint Appendix (J.A.) 766. *See also* J.A. 49 (Memorandum accompanying plaintiffs' motion stated: "The Polish Airlines decision [In re Air Crash Disaster at Warsaw, Poland, 705 F.2d 85 (2d Cir. 1983)] . . . render[s] [KAL] liable as a matter of law for full damages in the actions commenced in New York.").

We leave to the district court's sound discretion the question whether to direct or invite the parties to brief the issue of that court's authority to rule dispositively on the liability limitation with regard to plaintiffs who commenced their actions in district courts outside this circuit.

Memorandum Opinion of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565

Misc. Nos. 83-0345, 83-3448, 83-3450, 83-3454, 83-3457, 83-3458, 83-3459, 83-3463, 83-3465, 83-3466, 83-3469, 83-3470, 83-3473, 83-3792, 83-3890, 83-3898, 83-3902, 83-3903, 83-0029

IN RE:

KOREAN AIR LINE DISASTER OF SEPTEMBER 1, 1983

MEMORANDUM

This matter comes before the Court pursuant to the January 30, 1987 remand of the Court of Appeals for the District of Columbia Circuit. The Court of Appeals, in considering an interlocutory appeal from this Court's denial of Plaintiffs' Motion for Partial Summary Judgment, was unable to determine the precise scope of this Court's Order. The problem centered around the question of whether the principles of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), required the Court to apply Second Circuit precedent to actions originally filed in New York federal courts and then transferred to the District of Columbia pursuant to 28 U.S.C. § 1407(a). The parties have fully briefed this issue and the Court holds that its July 25, 1985 Memorandum and Order applies to all three categories of actions enumerated by the Court of Appeals.

In *Van Dusen v. Barrack*, the Supreme Court held that in diversity actions, changes of venue within the federal system do not change the *state* law which is applied to the cases. The Court wrote that "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of

courtrooms." *Van Dusen*, 376 U.S. at 639. The Court based its decision on the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938):

> The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to to a substantially different result.

Van Dusen, 376 U.S. at 638 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 100 (1945). The Court applied this policy to transfers pursuant to 28 U.S.C. § 1404(a) to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in a federal court which could not have been achieved in the Courts of the State where the action was filed." *Id.*

Because the principles underlying *Van Dusen* and *Erie* have at their foundation questions of the application of state law, neither is applicable to the situation presented here which involves conflicts between the Circuits concerning federal law. While it is true that several courts (including this Court) have applied the *Van Dusen* rule to claims involving federal law, they have failed to recognize the significance of this distinction.

"The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than of another determine his case." *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963) (citations omitted). *See also*, *In re The Pittsburgh*, 543 F.2d 1058, 1065 n. 19 (3d Cir. 1976) ("[I]n theory, at least, federal law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.") What this means in practice is that each federal court is bound to apply federal law the way it believes is appropriate. In the case at hand, this meant that the Court was to thoroughly analyze and consider Second Circuit law (and the law of every other Circuit for that matter) but not to blindly accept it. The conclusion of the

Court's analysis on the issue at hand was that for the reasons stated in its July 25, 1985 Memorandum and Order, the Court did not agree with the holding of *In re Air Crash Disaster of Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) and instead applied what it believed to be an accurate interpretation of federal law. This interpretation applied equally to those actions commenced in federal district courts in New York, Michigan, Massachusetts and the District of Columbia.

Plaintiffs argue in their Memorandum that if transferee courts were to consider cases as described above, the uniformity expressed by *Van Dusen* would be destroyed. While this may be true in the short-run, the long-term benefits of each federal court independently considering an issue are substantial. In this way, an issue may be viewed from several unique perspectives. If at the conclusion of these various analyses more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this matter is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

Plaintiffs also argue that because the case at hand was transferred to the District of Columbia for a limited purpose and shall be returned to the federal courts in New York, this Court should not create a conflict between the law of the case (which would be the law of this Circuit) and stare decisis (which would instruct the District Courts to follow the decisions of their own Court of Appeals). The Court believes, however, that the law of the case clearly controls this situation. Once a court finally decides any issue of law, the law of the case holds that the ruling should be adhered to by a transferor court. If this were not true, and tranferor courts were free to readjudicate issues determined by tranferee courts, tranfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate. This is not to say that the parties to an action must suffer for the sake of more efficient proceedings. As previously

stated, if a litigant believes he or she has been denied a favorable and correct interpretation of federal law, the Supreme Court is available to finally decide the question after an application for certiorari. This should be the course of the present litigation.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: May 7, 1987

Opinion of Court of Appeals for the
District of Columbia Circuit

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982

IN RE: KOREAN AIR LINES DISASTER OF
SEPTEMBER 1, 1983

PLAINTIFF'S STEERING COMMITTEE, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Misc. No. 83-00345)

Argued January 20, 1987

Decided September 25, 1987

Milton G. Sincoff, with whom *Donald W. Madole* and *Steven R. Pounian* were on the brief for appellant.

George N. Tompkins, Jr. for appellee.

Before: RUTH B. GINSBURG, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Concurring opinion filed by *Circuit Judge* D.H. GINSBURG, in which *Circuit Judge* WILLIAMS joins.

GINSBURG, RUTH B., *Circuit Judge*: This case arises out of an air disaster and raises turbulent federal questions. On September 1, 1983, Korean Air Lines (KAL) Flight 007, a commercial craft departing from Kennedy Airport in New York and bound for Seoul, South Korea, was destroyed over the Sea of Japan by Soviet Union military aircraft. Wrongful death actions were filed against KAL in several federal district courts; the Judicial Panel on Multidistrict Litigation transferred these actions to the District Court for the District of Columbia for pretrial proceedings pursuant to 28 U.S.C. § 1407 ("[C]ivil actions involving one or more common questions of fact . . . pending in different districts . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.").

The nub of the controversy relates to the per passenger damage limitation of the Warsaw Convention,[1] raised to $75,000 by an accord among airlines known as the Montreal Agreement.[2] By motion for partial summary judgment, plaintiffs sought a declaration "that [KAL] is liable without fault for compensatory damages without any limitation of $75,000." Joint Appendix (J.A.) at 26. Plaintiffs grounded this motion on the inadequate type size of the liability limitation notice printed on KAL passenger tickets. The notice appeared in 8 point type; the Montreal Agreement specifies 10 point type. Denying plaintiffs' motion, the district court, on July 25, 1985,

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED. REG. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

held that KAL could avail itself of the $75,000 per passenger limitation. *In re Korean Air Lines Disaster of September 1, 1983*, 19 Av. L. Rep. (CCH) 17,584 (D.D.C. 1985). In so ruling, the district court considered and rejected contrary Second Circuit precedent: *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983).

On September 24, 1985, the district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether KAL "is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets." We ruled that the requirements of section 1292(b) were met and that "wise exercise of our discretion dictates that the appeal be allowed." D.C. Cir. Order filed April 8, 1986.

On January 30, 1987, after argument of the appeal, we remanded the record for clarification of the scope of the district court's order denying plaintiffs' partial summary judgment motion. Specifically, we observed that the cases consolidated in this appeal

> can be grouped into three categories on the basis of the fora in which they were originally filed and to which they are to be remanded at or before the conclusion of pretrial proceedings, unless the actions are earlier terminated: (a) the Southern and Eastern Districts of New York; (b) the Eastern District of Michigan and the District of Massachusetts; and (c) the District of Columbia. The district judge, in his order denying plaintiffs' motion for partial summary judgment, did not expressly consider the contention that, by analogy to the principle set forth in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), he was bound by Second Circuit precedent in resolving the claims of plaintiffs in the first category enumerated above.

> The extent of a transferee court's authority under 28 U.S.C. § 1407 independently to resolve issues of [federal] law already passed upon by the federal court of appeals for the circuit in which the transferor forum is located is apparently a question of first impression, and our consideration of this issue is hampered by uncertainty as to which plaintiffs were covered by the district court's July 1985 order.

D.C. Cir. Order filed January 30, 1987.

By Memorandum dated May 7, 1987, the district court held that its July 25, 1985 decision denying plaintiffs' partial summary judgment motion applies to all three categories of cases described in this court's January 30, 1987 remand-for-clarification order. We now affirm the district court's dispositions. On the Warsaw Convention/Montreal Agreement $75,000 per passenger damage limitation issue, we adopt as our opinion the comprehensive July 25, 1985 Memorandum of the district court, and we reprint that disposition as an appendix hereto. We set out below our reasons for concluding that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit.

The Supreme Court, in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), addressed and resolved this question: when a defendant in a diversity action moves for a venue transfer under 28 U.S.C. § 1404(a),[8] which state's law applies post-transfer? The state law that would have applied in the transferor court adheres to the case, the Supreme Court held; in the Court's words, "with respect

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[8] Under this change of venue prescription, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

to state law," the venue change will accomplish "but a change of courtrooms." *Van Dusen*, 376 U.S. at 639.[4]

The *Van Dusen* interpretation of 28 U.S.C. § 1404(a), as the latter applies in diversity actions, rests on principles advanced in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and cases in the *Erie* line. *Van Dusen*, 376 U.S. at 637-40; *see particularly Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 387 (1941) (on issues of state law arising in diversity cases, federal courts must apply choice-of-law rules of states in which they sit). Justice Goldberg explained for the Court in *Van Dusen*:

> [O]ur interpretation [of § 1404(a)] . . . is supported by the policy underlying *Erie*[.] . . . [W]e should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. . . . What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.

Van Dusen, 376 U.S. at 637-39 (footnotes omitted).

Defendants in *Van Dusen* sought to transfer the case from the Eastern District of Pennsylvania to the District of Massachusetts. (Massachusetts, but not Pennsylvania, limited the damages plaintiffs could recover.) Were the transfer to be made, the Supreme Court ruled, though all further proceedings would take place in the Massachusetts district court, Pennsylvania law, not Massachusetts law, would furnish the governing state prescriptions.

The question before us is whether the *Van Dusen* rule—that the law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. It is a question meriting attention from Higher Authority. Congress, it appears, has not focused on the issue,[5] nor has the Supreme Court addressed it. The Judicial Panel on Multidistrict Litigation assumed, on at least one occasion, that the *Van Dusen* rule would apply to transferred federal claims, *see In re Plumbing Fix-*

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[4] The *Van Dusen* Court expressly did not decide whether the law of the state in which the transferor court sits would apply if plaintiff rather than defendant sought the transfer, or if a state court in the transferor court's state would dismiss the case on forum non conveniens grounds. *Van Dusen*, 376 U.S. at 640. Wright, Miller & Cooper indicate that several courts have applied the law of the transferor court even when plaintiff rather than defendant, moves for a transfer. 15 C. WRIGHT, A. MILLER & E. COOPER, *Federal Practice and Procedure* § 3846, at 367 (2d ed. 1986). A strong argument, however, favors application of the law of the transferee state in such instances. *See* ALI, *Study of Division of Jurisdiction Between State and Federal Courts*, § 1306(c) & commentary (1969).

[5] In Senate hearings on the bill that eventually became the multidistrict litigation statute, two witnesses stated that *Van Dusen* would apply to choice-of-law issues under the measure. The experience of those witnesses related to federal claims for antitrust law violations and it may be that they intended their statements to cover such claims. *See Multidistrict Litigation: Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 13, 25 (1966) (statements of Dean Phil Neal and Judge William Becker). The Supreme Court, however, in explicit and repeated qualifications, confined its *Van Dusen* opinion to questions of state law. *See* 376 U.S. at 625-26, 630, 633, 635, 639. The snippet of legislative history just described, therefore, is at best equivocal; the two witnesses perhaps "mean[t] only that *Van Dusen* would apply to state law issues in cases transferred under the new statute." Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 710-11 (1984).

tures Litigation, 342 F.Supp. 756, 758 (J.P.M.D.L. 1972),[6] but the Panel, from what we can glean, has given the matter only fleeting consideration.[7] Recognizing that the question is perplexing, particularly in the context of 28 U.S.C. § 1407, a statute authorizing transfers only for pretrial purposes, we are persuaded by thoughtful commentary that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit." Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 721 (1984); *see also* Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 662-706 (1987).

As the district court stressed in response to our remand, the *Erie* policies served by the *Van Dusen* decision do not figure in the calculus when the law to be applied is federal, not state. Given the reality of conflict among the circuits on the proper interpretation of federal law, however, why deny to a plaintiff with a federal claim the "venue privilege" a diversity claimant enjoys? Plaintiffs in the *Van Dusen* situation could effectively pick Pennsylvania rather than Massachusetts law and retain the benefit of that choice after transfer. Why deny a similar right of selection and retention to plaintiffs who would fare better under the Second Circuit's

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[6] In *Plumbing Fixtures*, a plaintiff resisted § 1407 transfer of his price-fixing claim on the ground that under transferee forum precedent, his standing to sue would be rejected. The Panel stated, with no elaboration: "It is clear [under *Van Dusen*] that the substantive law of the transferor forum will apply after transfer." 342 F.Supp. at 758.

[7] Several lower courts have also declared, without exposition, that *Van Dusen*'s reasoning would apply to transferred federal claim cases. *See* Marcus, *supra* note 5, 93 YALE L.J. at 692-93 & n.100 (citing cases). Other lower courts have stated that *Van Dusen* does not apply to transferred federal claims. *Id.* at 693 n.102 (citing cases).

interpretation of federal law than under the D.C. Circuit's interpretation?

The point has been cogently made that venue provisions are designed with geographical convenience in mind, and not to "guarantee that the plaintiff will be able to select the law that will govern the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 n.24 (1981); *see* Marcus, *supra*, 93 YALE L.J. at 696-701. In diversity cases, however, federal courts are governed by *Klaxon* and therefore may not compose federal choice-of-law principles; instead, they must look to state prescriptions in determining which state's law applies. With "no federal choice-of-law principles that favor the application of the law of one state over the law of another," the diversity plaintiff's opening move or "venue privilege" ordinarily fills the gap—it "prevails by default." Marcus, *supra*, 93 YALE L.J. at 700-01. For the adjudication of federal claims, on the other hand, "[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law," *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963); there is no compelling reason to allow plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray.

As summarized in the commentary we find persuasive:

> The *Van Dusen* Court stressed the venue privilege because [under *Klaxon*] there is no federal principle by which to select the state law that should govern diversity cases. Where federal claims are transferred, however, the principle that the transferee federal court is competent to decide federal issues correctly indicates that the transferee's interpretation should apply.
>
> . . .
>
> For federal courts, the most significant choice-of-law difference between issues of state law and issues

> of federal law is that they lack competence to [develop rules of decision for] the former and are presumptively competent to decide the latter. . . . [T]he federal courts have not only the power but the duty to decide [issues of federal law] correctly. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job.

Marcus, *supra*, 93 YALE L.J. at 679, 702; *see also* Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 412 (1972) ("I take [*Van Dusen*] to be limited to choices of *state* law.") (emphasis in original).

Application of *Van Dusen* in the matter before us, we emphasize, would not produce uniformity. There would be one interpretation of federal law for the cases initially filed in districts within the Second Circuit, and an opposing interpretation for cases filed elsewhere. Applying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings. Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory. Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.[8]

[8] Even if it appears plausible to legal minds to mete out in a consolidated case one version of federal law to plaintiffs whose counsel filed in the Southern or Eastern District of New York, another to plaintiffs whose counsel filed in the District Court for the District of Columbia, it would be difficult to explain the rationality of such divergencies to the lay persons served by the federal judicial system.

The district judge in the instant case observed that

> [i]f . . . more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this [way] is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

May 7, 1987 D.D.C. Memorandum at 4. We agree. The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.

We return, finally, to the most anomalous feature of this case. As earlier observed, we deal here not with an "all-purpose" transfer under 28 U.S.C. § 1404(a), but with a transfer under 28 U.S.C. § 1407 "for coordinated or consolidated pretrial proceedings." We have held, in accord with the district court, that the law of a transferor forum—here, the law of the Second Circuit—merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit. Should the several cases consolidated for pretrial preparation in the instant proceeding eventually return to transferor courts outside this circuit,[9] would our district court's

[9] In practice, it has been reported, most cases transferred under § 1407 are not remanded. *See* 1986 Ann. Rep. Director Admin. Off. U.S. Courts 128 (as of June 30, 1986, 15,026 actions had been subject to § 1407 proceedings; of those, 10,903 had been terminated by the transferee court); Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and*

Warsaw Convention/Montreal Agreement ruling, which we have affirmed, have binding force? We believe it should, as "law of the case," for if it did not, transfers under 28 U.S.C. § 1407 could be counterproductive, *i.e.*, capable of generating rather than reducing the duplication and protraction Congress sought to check. *See* Steinman, *supra*, 135 U. PA. L. REV. at 664-67, 700-704. On this issue in the case at hand, however, our circuit is not positioned to speak the last word.

We affirm the order of the district court that KAL is entitled to avail itself of the limitation on damages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and we note again that the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretive authority in a case such as this one, are matters in need of definitive resolution for our national court system.

Affirmed.

Transferred Cases and in Multidistrict Litigation, 135 U. PA. L. REV. 595, 667 & n.247, 700 & nn.410, 411 (1987); Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts, and Transferee Courts*, 78 F.R.D. 575, 583 (1978).

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Civil Action Nos. 83-2793,
83-2941, 83-3154, 83-3177,
83-3204, 83-3441, 83-3445,
83-3448, 83-3449, 83-3450,
83-3451, 83-3452, 83-3453,
83-3454, 83-3455, 83-3456,
83-3457, 83-3458, 83-3459,
83-3460, 83-3461, 83-3462,
83-3463, 83-3464, 83-3465,
83-3466, 83-3467, 83-3468,
83-3469, 83-3470, 83-3473,
83-3474, 83-3587, 83-3588,
83-3792, 83-3793, 83-3889,
83-3891, 83-3898, 83-3901,
83-3902, 83-3903; 84-0029,
84-0030, 84-0402

MEMORANDUM AND ORDER

INTRODUCTION

Before the Court is a motion for summary judgment on the sole issue of the enforceability of the limitation on damages established by the Warsaw Convention (Conven-

tion)[1] and asserted by Defendant Korean Air Lines Co., Ltd. (Korean Air Lines) in the above-captioned multidistrict litigation. These Plaintiffs argue that, as a matter of law, Korean Air Lines is liable to them to the full extent of their damages for having delivered defective tickets to their decedents, passengers killed when a commercial airliner (KAL 007) owned and operated by Defendant was tragically destroyed by Soviet military aircraft over the Sea of Japan.

The material facts are undisputed. Defendant delivered tickets to Plaintiffs' decedents before their "international transportation" began. The tickets contained notice of the applicability of the Warsaw Convention's rules limiting Korean Air Lines' liability. The notice was printed in 8.0 type size. Since the passenger tickets at issue included a point of origin, destination or stopping place within the United States, the provisions of the Montreal Intercarrier Agreement (Montreal Agreement),[2] are also relevant. The question before the Court is whether the failure to print notice to passengers of the applicability of the Warsaw Convention in 10-point modern type size, as required by the Montreal Agreement, strips the carrier of the Convention's liability limitation. Having considered the treaty, its history and development, and all evidence presented, the Court concludes that the carrier cannot be prevented from availing itself of the limitation; Plaintiffs' motion shall be denied.

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

[2] Agreement Relating to Liability Limiations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED. REG. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

HISTORY OF THE WARSAW CONVENTION

Before considering this motion, it is necessary to clearly understand the Warsaw Convention. It is a multilateral treaty intended to uniformly regulate international airline transportation. Today, more than 120 nations adhere to the rules contained in the Convention. Originally negotiated at two international conferences, the first in Paris in 1925 and the second in Warsaw in 1929, the Convention had a dual purpose. In recognition of the fact that the newly emerging air industry would link many nations of divergent systems and laws, the first goal was to establish some degree of uniformity as to documentation for tickets and the like and as to the procedure and substantive rules of law which would govern claims arising out of international transportation by air. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967). In order to help the then fledgling air industry to attract needed capital, the second goal was to limit the potential liability of the air carriers in the case of accidents. Clearly recognized as the more important goal of the Convention, in Article 22(1), the limitation on liability was set at 125,000 Poincare francs, or approximately 8,300 United States dollars.[3] In exchange for the limitation, the Warsaw Convention, in Article 20, created a rebuttable presumption of air carrier liability unless "he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Article 25 then provided that, in cases where a plaintiff is able to

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[3] The actual amount was $8,291.87. Block v. Compagnie Nationale Air France, 386 F.2d 323, 325 (5th Cir. 1967). Article 22(4) of the Convention provides that "The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

prove "willful misconduct" the carrier will not be entitled to avail himself of the limitation on liability.

On July 31, 1934, the United States deposited its instrument of adherence to the Warsaw Convention in the archives of the Ministry of Foreign Affairs of Poland in accordance with the procedure set forth in Article 37 of the treaty. At the time the Senate ratified the treaty, notably during the time this country (and the world) was in the midst of the Great Depression, the $8,300 amount of the limitation was thought to provide some benefit to both passengers and carriers. Indeed, Secretary of State Cordell Hull transmitted the Warsaw Convention to the Senate with the following statements:

> It is believed that the principle of limitation will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934). Therefore, at the time of ratification, the principle and the amount of limitation were assented to by the United States. Since that time and especially with the growth of the air industry to its present proportions, the limitation has become an increasingly uncomfortable and unpopular proposition.

While the limitation was once accepted, it has constantly been the focus of debate and disagreement. The

United States, although adhering to the uniform rules relating to international transportation, has not been satisfied with the low limits placed on air carrier liability. As early as 1935, one year following United States adherence, there was discussion of possible amendment to the Convention. Lowenfeld & Mendelsohn at 502. As a result of the alarm expressed by the United States and other nations where full recovery for personal injury and wrongful death had become the rule, discussions and proposals for change continued until another conference met in September 1955. Convened this time at the Hague, the stated goal was to resolve the debate concerning whether the liability limits had been set at an appropriate level. Lowenfeld & Mendelsohn at 504. The Hague Conference, therefore, had a limited purpose with the intent being to retain uniformity in the rules and conditions expressed in the Warsaw Convention while resolving the dissatisfaction with the low limits of liability. S. SPEISER & C. KRAUSE, 1 *Aviation Tort Law* 670-74 (1978).

Through much negotiation and debate the Hague Protocol did, among other things, double the limitation to $16,600. Nonetheless, the outcome of the Hague conference failed to resolve the dissatisfaction; the United States never ratified the Hague Protocol. In fact, the amendments to Warsaw were never presented to the Senate for ratification, since even the increased limitation faced an unpleasant political climate. Lowenfeld & Mendelsohn at 515. The limitation amount therefore remained at $8,300 in this country.

Discontent continued for another decade. Then, in 1965, the United States determined that the Warsaw limitation could no longer be tolerated and decided to denounce the treaty. Deposited November 15, 1965 and in accordance with Article 39, set to become effective six months later, the State Department Press Release concerning the Notice of Denunciation stated that "the United States wishes to make clear that the action to denounce the Warsaw Con-

vention is taken *solely* because of the Convention's low limits of liability for injury or death to passengers, and in no way represents a departure from the longstanding commitment of the United States to the tradition of international cooperation in matters relating to civil aviation." 53 Dept. State Bull. 923, 924 (1965) (emphasis added). The Notice continued to state clearly that the threat of denunciation would be withdrawn if the limitation were raised, by special contract or otherwise, to preferably $100,000 but not less than $75,000.

The Montreal Agreement was adopted in response to the United States' decision to withdraw from the Warsaw Convention. Unlike the Hague Protocol, the Montreal Agreement did manage to calm the din of criticism of the low limits which had, by 1965, "reached a crescendo." S. SPEISER & C. KRAUSE at 674. In order to avert United States denunciation of the treaty, air carriers agreed to raise the limitation amount to $75,000 and to submit to virtual strict liability; the Montreal Agreement provides that an air carrier "shall not . . . avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by [Hague] Protocol." In addition, the Agreement provided that the "Montreal Advice" would be printed in 10-point type and in ink contrasting with the ticket stock. However, the Montreal Agreement is completely silent with respect to sanctions to be imposed for failure to comply with any of its three provisions.

Contrary to the view that waiver of the limitation was contemplated, the Montreal Agreement was entered into to *preserve* the limitation. Intended only as an interim agreement until the treaty could be amended, the Montreal Agreement achieved a stand-off on the issue of the level of the limitation. By its very terms, the Agreement is only a "special contract" under the Warsaw Convention. It applies to "international transportation" as defined in Article 1(2) which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. While leaving air carriers liable without

fault, the Agreement permits air carriers to avail themselves of the liability limitation found in Article 22(1); however, the amount of the limitation is increased to $75,000 and the defenses found in Article 20(1) have been waived.

Although the increase from $8,300 to $75,000 was significant, the fact remains that the United States will probably never be satisfied with any amount as a limit upon recovery. Therefore, while the debate has been phrased in terms of the "appropriate" level of the limitation, *see, e.g.*, Lowenfeld & Mendelsohn at 504, it is the very idea of any limit at all which has been and remains the problem. The United States has consistently rejected all limitation amounts; it certainly appears that "no convention with a limitation of damages can possibly pass the Senate of the United States." Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 529 (1967).

ISSUES PRESENTED

At issue is the interpretation of Article 3 of the Warsaw Convention which provides:

> (1) For the transportation of passengers the carriers must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. *Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982) (emphasis added).

Originally, Plaintiffs based their motion on a claim that the Montreal Agreement modified these provisions of the Convention so as to require air carriers to deliver to passengers embarking on "international transportation" tickets containing notice of the applicability of the Warsaw Convention in at least 10-point type size in order to limit their liability. It is Plaintiffs' position that the Montreal Agreement also "modified" the treaty provisions relating to the amount of the limitation, raising it from $8,300 to $75,000. Further, Plaintiffs argue that a carrier's failure to print the Montreal Advice in at least 10-point type constitutes "non-delivery" of a ticket under Article 3(2) and therefore triggers the treaty sanction—forfeiture of the limitation for air carrier liability.

In a subsequent pleading, Plaintiffs changed the focus of their argument from a claim that the Convention was modified in Montreal to a claim that the Warsaw Convention is not applicable at all because "Korean Air Lines, a corporate citizen of a nation not a party to the Warsaw Convention, has no standing to avail itself of

the defenses contained in the Warsaw Convention." Plaintiffs' Reply Brief at 3. This argument is based on the notion that there is no treaty relationship between the Republic of Korea and the United States and that, therefore, the Convention cannot apply to an air carrier incorporated in Korea. Plaintiffs contend that the absence of a treaty relationship with Korea, if indeed there is no such relationship, prevents Korean Air Lines from asserting the Warsaw Convention limitation on liability. However, if Plaintiffs are correct and the applicability of the Convention rests on the existence of reciprocal ratification by Korea and there has been no such ratification, then, not only would Korean Air Lines be precluded from claiming the limitation, the Court would be altogether precluded from exercising jurisdiction over the air carrier.

Korean Air Lines vigorously opposes the motion for partial summary judgment. Under either of the somewhat contradictory theories posited by Plaintiffs, Defendant claims that the Montreal Agreement, being an agreement between air carriers, not nations, cannot modify the Warsaw Convention to require or trigger the imposition of the treaty sanction of unlimited liability. Further, Korean Air Lines argues that the United States and the Republic of Korea do maintain a treaty relationship with respect to the Convention; consequently, Plaintiffs' second theory cannot be correct.

By challenging Korean Air Lines' statement that "the rights of the moving plaintiffs and defendant KAL are governed exclusively by the provisions of a treaty of the United States known as the Warsaw Convention," Plaintiffs' second theory impugns the jurisdiction of the Court. The challenge to "treaty jurisdiction" affects not only the actions filed by these Plaintiffs, but this entire multidistrict litigation. Therefore, the question concerning jurisdiction and the requirement of a treaty relationship with Korea must be examined before proceed-

ing to the issue of the applicability of the Warsaw Convention limitation on liability.

JURISDICTION UNDER THE WARSAW CONVENTION

Article 1(1) provides that "[t]his Convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire." Article 17 of the Convention makes the carrier liable for the death or personal injury of passengers sustained while engaged in international transportation. Article 24 of the Convention further states that cases brought for damages sustained in the event of wounding of passengers "can only be brought subject to the conditions and limits set out in this convention"; Article 32 emphasizes this point by stating that the parties are prevented from "deciding the law to be applied" or "altering the rules as to jurisdiction." Therefore, nations which are parties to the Warsaw Convention have agreed that actions for wrongful death or personal injury occurring during "international transportation" will be governed by the rules of the Convention.

As a treaty of the United States and, therefore, the "supreme Law of the Land," U.S. Const. art. VI, the Warsaw Convention preempts other laws. Since the Warsaw Convention applies to "international transportation" and since the United States has agreed to this treaty, as "supreme Law of the Land" the Convention exclusively and specifically controls the recovery which plaintiffs seeking damages for wrongful death or personal injury occurring during "international transportation" may receive in American courts. *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983). The Convention also governs the question of jurisdiction; therefore, the Court must look to the terms of the Convention to determine its applicability.

By its terms, the Warsaw Convention applies only to "international transportation," defined in Article 1(2) as

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

The four conditions specified in Article 28(1), *i.e.*, domicile of the carrier, principal place of business, place where the ticket was purchased or the place of destination, are generally thought to control jurisdiction once "international transportation" has been established. *See, e.g., Vergara v. Aeroflot "Soviet Airlines"*, 390 F. Supp. 1266; 1269 (D. Neb. 1975); *Smith v. Canadian Pacific Airways, Ltd.* 452 F.2d 798 (2d Cir. 1971); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). There being no genuine issue respecting either Article 1(2) or Article 28(1) for the tickets relevant to this motion there should be no question that the Warsaw Convention applies to these actions and that there is treaty jurisdiction in this Court. However, Plaintiffs raise the question of jurisdiction by contending that there is no treaty relationship between Korea and the United States as regards the Warsaw Convention and that the absence of a treaty relationship prevents the Court from exercising any of the Convention's provisions in favor of Defendant, Korean Air Lines, a corporate citizen of Korea. Instead, Plaintiffs would have the Court "enforce" the Montreal Agreement, as though it were a separate contract, without regard to the Warsaw Convention.

Plaintiffs' argument assumes "treaty jurisdiction" is not necessary to maintain these actions. That is incorrect. "If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a), which permits cases *arising under* United States treaties, clearly cannot be established." *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d at 802 (emphasis in original); *accord, In re Air Crash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982). If Plaintiffs are correct, and there is no treaty jurisdiction because there is no treaty relationship, then there is no federal jurisdiction over the Defendant at all.

The Court rejects Plaintiffs' contention that there is no treaty relationship between the United States and Korea. Central to Plaintiffs' argument is the fact that the Republic of Korea adheres to the Protocol Amending the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air (Hague Protocol), 478 U.N.T.S. 371 (1955) rather than to the Warsaw Convention. By distinguishing the Protocol from the Convention as though the two are independent treaties and by arguing that there is no treaty relationship between this nation and Korea, Plaintiffs ignore the development of the Warsaw system. Having considered the history of the Hague Protocol, the Court concludes that the Protocol cannot be considered separately from the Warsaw Convention; it consists of nothing more than a list of amendments to the original treaty. Indeed, the only difference between the titles of the Convention and the Protocol are the very words "Protocol to Amend." The very name of the Hague Protocol gives evidence that it was intended and, in fact, is merely the Warsaw Convention with certain alterations.

Knowing the history of the conference which produced the Hague Protocol and the reasons the United States negotiated and signed but never ratified the Hague Protocol provides a context for understanding the relationship of the United States to those countries which choose to adopt those amendments. First, since the Protocol came later than the Convention it essentially offered new nations a choice: adopt the Warsaw Convention as originally formulated in 1929 or adopt the amended version as formulated in 1955. The purpose of the Warsaw Convention was to unify the rules; the purpose of the Hague Protocol was merely to amend those same rules. Korea has chosen to adhere to the Hague Protocol and is therefore a High Contracting Party to the Warsaw Convention *through* those amendments. In fact, Article XXIII of the Hague Protocol states:

> Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by the Protocol.

Therefore, since July 13, 1967, Korea has adhered to the Warsaw Convention through its ratification of the Hague Protocol. At least with respect to the unamended portions of the Convention, the United States and Korea are parties to the same treaty.

Moreover, it would hardly encourage the goal of the Warsaw Convention to establish uniform rules, law and procedure for claims arising out of international aviation and then to complicate the application of those rules by requiring reciprocity in ratification. The delegates to the Hague Conference were well aware of this and deliberately adopted the negotiated amendments merely as a Protocol to amend Warsaw rather than as an entirely new convention specifically to retain uniformity. S. SPEISER & C. KRAUSE at 671-72. Plaintiffs' argument fails because "[t]he Convention is not concerned with reciprocal treatment of nationals; its purpose is to unify rules relating to international transportation by air." S. SPEISER & C. KRAUSE at 666.

The negotiations and events which led to the Montreal Agreement were themselves tied to the convention. Plaintiffs' argument that the Montreal Agreement may be considered without resort to the entire Warsaw system of recovery is untenable.

INTERPRETING THE WARSAW/MONTREAL LIMITATION OF LIABILITY

On the issue of maximum liability limits, there has been considerable debate and clash of ideology. Yet more than five decades of discussion have managed to produce no more than an uneasy truce on the issue. The level of the limitation has been tinkered with in hopes of making it more palatable. The United States has been able to force some concessions, principally in the nature of a "special contract"—the Montreal Intercarrier Agreement—increasing the limit for wounding, injury or death occurring during the international transportation of passengers involving a point of origin, point of destination or agreed stopping place in the United States; however, the United States remains unhappy with the concept of a limitation on damages.

While the increase from $8,300 to $75,000 brought about by the Montreal Agreement is certainly significant, evidence of continuing American dissatisfaction with *any* limit is found in the fact that the United States Senate has ratified no Convention, Protocol or Agreement since joining the original Convention. This is true even though the United States has been presented with at least three opportunities to join in treaty amendments to raise the limitation. First, there was the Hague Protocol, and then the proposed Guatemala Protocol.[4] The Guatemala Protocol is drafted so as not to become effective without United States ratification. Although these amendments

[4] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Doc. No. 8932 (1971), *reprinted in* A. Lowenfeld, Aviation Law Documents Supplement 975-84 (2d ed. 1981).

would have raised the limitation to $100,000, the United States Senate failed to ratify by the required two-thirds margin. The most recent amendments proposed to the Convention were drafted in Montreal. These amendments, known collectively as the Montreal Protocols,[5] would have provided for a maximum recovery of approximately $105,000; still the Senate failed to ratify. *See* 129 CONG. REC. S2237 (daily ed. March 7, 1983); 129 CONG. REC. S2279 (daily ed. March 8, 1983). Having rejected all proposals to date, it certainly seems that the United States is determined to accept no convention which imposes a limitation on the recovery available to citizens of this country. Therefore, while the debate has been couched in terms of the appropriate level of the limitation, it is the presence of a limitation at all that has been the real concern.

A. *Criticisms of the Treaty Limitation*

There have been two principal criticisms of the Convention's limitations. First, the limitations have been objected to on the ground that the reason for limiting liability in 1929 no longer exists today. In 1929, the limitation was adopted in order to promote a fledgling industry. "The international air giants of today were literally in their swaddling clothes." L. KREINDLER, 1 *Aviation Accident Law* 342 (1963) [hereinafter 1 *Aviation Accident Law*]. Then, the air industry was struggling to become truly international. Capital had yet to be invested and needed encouragement. It was hoped that the limitation on damages would attract capital and allow carriers to obtain insurance that might otherwise be discouraged by the threat of a single catastrophic accident. Lowenfeld & Mendelsohn at 499.

[5] Additional Protocol Nos. 1-4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Nos. 9145-9148 (1975), *reprinted in* A. Lowenfeld, Aviation Law Documents Supplement 985-1001 (2d ed. 1981).

Today, however, the world of aviation is vastly different. In the fifty years since the Convention, air carriers have obtained both the necessary capital and insurance to allow the industry to grow to tremendous proportions. It is now the air industry, not individual members of society, which is best able to bear the burden of loss in cases of catastrophic accidents. Society, having accepted the burden of low recoveries during the industry's infancy, now feels that the risk of loss is better placed on what have grown to be major, mature corporations, often operating as world enterprises, instead of the individual victims. The consensus seems to be that "there is no longer any need to provide special protection to an industry which is capable of reimbursing customers for the damages it causes them." Comment, *The Growth of American Judicial Hostility to the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 830 (1983). Moreover, it has been noted that domestic airlines managed to flourish without a similar limitation placed on liability. 1 *Aviation Accident Law* at 346.

The second, related, criticism of the treaty limitation has been that liability limitations are "an affront to the American ideal of full and adequate compensation to injured plaintiffs by those responsible for the harm." *Id.* American courts operate under the principle that "[i]t is absolutely basic and fundamental . . . that an injured person should be appropriately compensated for the loss he has sustained." KREINDLER, *supra*, 33 J. AIR L. & COM. at 530. Within our system of law, the imposition of a maximum recovery, without regard to the amount of damages which may be proven, is a significant deviation from traditional American tort law principles. *See* 1 *Aviation Accident Law* at 344-45.

The two major criticisms together, that a limitation on tort recovery is anathema to traditional American legal principles and that the air industry has long since

outgrown the need for special protection, combine for a forceful argument against continued application of the liability limits found in the Convention. "It is not insignificant to note however, that the original policy has lost a great deal of its persuasive force; air travel is no longer an infant industry." S. SPEISER & C. KRAUSE at 636-37. Nevertheless, the fact remains that the United States is a High Contracting Party to the Warsaw Convention, complete with treaty limitation. While this may be at variance with traditional tort law, as long as the political branches of our government choose to adhere to the Convention, the courts of the nation are obliged to enforce it as it was negotiated and written. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 273; (1984) (Stevens, J., dissenting).

B. *Interpretations of the Treaty Limitation*

It is well established that treaty interpretation involves a consideration of the history and intent of the contracting sovereigns. *Choctaw Nation v. United States*, 318 U.S. 423 (1943). Treaties are to be construed liberally but are not deemed to be abrogated or modified unless such intent has been clearly expressed. "Legislative silence is not sufficient to abrogate a treaty." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. at 252. Further, the Warsaw Convention being a treaty of voluntary adhesion, should the political branches of our government determine that the treaty obligations have become more onerous than the foreign policy considerations justify, the treaty's provision for denunciation could be invoked again. For this reason, "[p]lainly, a party to a treaty of voluntary adhesion can have no need for the doctrine of *rebus sic stantibus* [changed circumstances], except insofar as it might wish to avoid the notice requirement [Article 39]." *Id.* at 253 n.24. If the adhering nations have no use of the doctrine, then clearly private parties such as these may not invoke the doctrine on their behalf. *Id.* at 253.

And yet American courts, faced with the prospect of enforcing a limitation which has become outmoded and contrary to domestic law, have taken avoidance of the treaty limitation upon themselves and have arrived at an interpretation of the Warsaw system which, in cases such as those presented by Plaintiffs here, eliminates the treaty limitation altogether. There are two provisions in the Warsaw Convention which, as a sanction, strip the limitation of liability from an air carrier. First, there is the "wilful misconduct" section, Article 25, which excepts from the limitation those cases in which a plaintiff can prove that the accident generating the action was caused by the carrier's "wilful misconduct," which is to be defined by the court of law to which the case is submitted. Since the plaintiff's burden under this provision is a heavy one, this Article provides little ground from which to attack the limitation.

Consequently, the majority of courts have addressed the issue through judicial interpretation of Article 3.* This provision has provided much space for judicial maneuverings and innovative interpretations. Specifically, Article 3(2) provides:

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

(Emphasis added.)

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* The limitation has been attacked on constitutional grounds as well *see, e.g.*, In re Aircrash in Bali, Indonesia on April 11, 1974, 684 F.2d 1301 (9th Cir. 1982); Burdell v. Canadian Pacific Airways, 10 Av. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968).

By providing for unlimited liability where there has been "nondelivery" of a passenger ticket, this Article of the Warsaw Convention has been given a construction, in conjunction with the Montreal Agreement, which eliminates the limitation for many plaintiffs.

1. "Adequate notice"

Construing the phrase "accept a passenger without a passenger ticket having been delivered" to include physically delivered tickets which fail to contain "adequate notice" of the Warsaw/Montreal limitation, courts have made a way for full recovery where there was none. In a line of cases beginning with *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), through the most recently decided *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, supra*, increasing importance has been placed on the passenger's need to know that in the case of tragedy during international air travel his recovery will be severely limited. "Adequate notice," ordinarily thought of as a domestic legal concept, has been judicially written into the Convention, in order to give "substance" to the provision regarding passenger tickets.

Ironically, a dissenting view in *Lisi* may have been a premonition of the developments to come. Noting that "[t]he majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it," *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting), *aff'd by equally divided court*, 390 U.S. 455 (1968), the dissent termed the court's action in what was a turning point in the law "judicial treatymaking." *Id.* Further, Judge Moore noted that "[w]ere actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both

understood and agreed to the limitation." *Id.* While it may be overstated, the hypothetical does drive home the point that preoccupation with the type size has less to do with "adequate notice" than with rejection of the limitation.

Although Article 3(1)(e) specifies that a passenger ticket shall contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention," Article 3(2) says nothing regarding the "adequacy" of notice or any other particulars of the required statement. A literal reading of the provision would seem to indicate that the Convention is intended to apply regardless of whether or not the physical ticket is retained once it has been delivered into the possession of the passenger; certainly, there is no requirement that it be read by the passenger. Also, defects in the physical ticket are not to interfere with the enforceability of the liability rules. Indeed, inadequate notice through the statement could be considered an "irregularity" or defect in the pasenger ticket which "shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention."

Nevertheless, in *Mertens v. Flying Tiger Line, Inc.*, the Second Circuit found that physical delivery of a ticket once the passenger has boarded the airplane is inadequate and constitutes "nondelivery" under Article 3(2). The court stated: "We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. . . . The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air." 341 F.2d at 856-57. However, the situation presented to the *Mertens* court involved *physical* delivery of the passenger ticket. While it is not surprising that an American court would find it necessary that

notice, once required, be given "in such a manner as to afford [the passenger] a reasonable opportunity to take self-protective measures," a notice requirement is nowhere within the treaty nor is the Article 3(1)(e) statement linked with the limitation.

The definition of "adequate notice" found in *Mertens* was dependent upon the timing of the physical delivery of the ticket. The court found that the ticket containing notice must be delivered in circumstances allowing the passenger to obtain additional protection, if desired. Given that the *Mertens* court had decided that the limitation was such an alarming prospect for any passenger to face, it is not surprising that the standard for permitting the limitation to stand and for protecting the passenger against the limitation became strict notice of the limitation.

In *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965), the court followed the reasoning in *Mertens* and held that the very inclusion of a requirement to provide a statement of the applicability of the Convention's limitation meant that "[t]he purpose of such a statement is to notify passengers of the applicability of the Convention, thus affording them an opportunity to take steps to protect against the limitation of liability." 352 F.2d at 497. The Ninth Circuit expanded the *Mertens* holding, stating that there is an "implied requirement of Article 3(2), that delivery of the passenger ticket be made sufficiently in advance of the flight so that the passenger may, if he desires, obtain additional insurance protection." 352 F.2d at 498.

Occurring before the Montreal Agreement became effective, and indeed, before the United States threatened denunciation of the Warsaw Convention, these cases did not rely on the nature or size of the print found on the passenger ticket. Nonetheless, the courts managed to sidestep the limitation and provide what is already proper under domestic law: full recovery to injured plaintiffs.

Then, almost immediately following these cases, again before the Montreal Agreement, focus began to be placed on the "adequacy of notice" as related to the print of the ticket. A landmark case, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided court*, 390 U.S. 455 (1968), held that "compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable." 253 F. Supp. at 239 (footnote omitted). Having phrased the question with respect to Article 3(2) as one of "adequate notice," the lower court in *Lisi* went on to find that the notice of the applicability of the liability limitations was in fact inadequate because it was printed in "microscopic type," "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract.'" 253 F. Supp. at 243. Further, the court found that the required statement was "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed." *Id.* In effect, then, the court found that even with advance physical delivery, without a properly legible statement of the limitation, there could be no delivery of the ticket. In this way, the court rewrote that provision in the Convention which states that failure to include the statement of limitation on liability *does* not affect the applicability of the Convention's rules. While the *Lisi* court may well have construed the diminutive statement as equivalent to no statement at all, it seems at least somewhat extreme to have equated this fact to non-delivery of the entire contract of carriage. Article 3(2) appears directed to the *entire* ticket, which is evidence that a contract has been formed, and appears much less concerned with notice of limitation on liability than American courts have imputed to the drafters of the treaty.

On appeal, the Second Circuit noted:

> The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

370 F.2d at 512-13 (footnote omitted). Again, the court was concerned with giving the Convention meaning; this meant giving the passenger "notice" of the position he was placing himself in by traveling internationally by air. Moreover, it has generally been agreed that the *quid pro quo* for the limitation is, not notice, but liability without fault. Even at the Hague Conference, liability as determined under the "wilful misconduct" provision was linked to the attempts to raise the limitation. Lowenfeld & Mendelsohn at 505. There is no evidence that the treaty drafters and signatories intended "adequate notice" to affect the operation of the treaty limitation.

There is in fact evidence to the contrary. In *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (Can. 1979), *rev'g* 53 D.L.R.3d 636 (Que. C.A. 1974), *aff'g in part and rev'g in part*, 12 Av. Cas. (CCH) 17,191 (Que. Super. Ct. 1971), the reasoning which was developed in *Mertens*, *Warren* and *Lisi* was considered and rejected. In *Ludecke*, the Supreme Court of Canada found:

> [T]he words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above

> which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1(*e*) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test.

98 D.L.R.3d at 57.

Given the history of discontent with the limitation, it seems that the decisions rendered in these cases were directed toward correcting what is admittedly an inequitable burden as presently borne between carriers and passengers. Instead of giving weight to the history of the Warsaw/Montreal system, the courts have managed to interpret an additional waiver provision into the treaty.

Following the acceptance of the Montreal Agreement and the United States withdrawal of its Notice of Denunciation, the courts have continued to view with disapproval the limitation on air carrier liability. Judicial circumvention of the treaty limitation has taken a slightly different direction upon United States acceptance of the Montreal Agreement. Instead of focusing upon the timing of physical delivery, as in *Warren* and *Mertens*, the *Lisi* concern with the statement, which is never referred to as "notice" in the Convention itself, and the size of the print, increasingly became the focal point for attack.

2. 10-point type size requirement

As early as 1963, before the Montreal Agreement, the Civil Aeronautics Board promulgated regulations for air carriers which required the statement of applicability of the limitation to be printed in at least 10-point modern type size on paper of contrasting color. *See* 14 C.F.R. § 221.175(a). In *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973), this Circuit Court of Appeals rejected the petitioning air carrier's argument that promulgation of the C.A.B. regulation conflicted with the Warsaw Convention and exceeded the agency's authority. The Circuit Court first found that the terms of Article 3 do not preclude the addition of more specific requirements regarding the statement. Further, the Court found that "[t]he recent trend of appellate court decisions has been to accord substance to the protections that Article 3 of the Convention intended to provide airline passengers." 479 F.2d at 917. The Court continued to find that "[t]he passenger is to receive full and effective notice of any limitations of liability so that alternative protection may be obtained." *Id.* The *Deutsche Lufthansa* case first determined that the C.A.B. regulations are valid and do not contravene the purposes of the treaty; in making this finding the Circuit also accepted the *Lisi* holding that "unless adequate notice is accorded its passengers, the carrier will later be precluded from using the Convention to limit liability." *Id.* at 918. In dicta surrounding the challenge to the domestic regulation, this Circuit noted that compliance with the regulation will not only provide passengers with adequate notice of the limitations on liability imposed on them but will later enable the carrier to invoke the protection of Article 8(1)(e); however this Circuit did not and has not yet addressed the question of what constitutes "adequate notice."

Having gone beyond the question of whether notice is required by the treaty, the question of just what constitutes "adequate notice" was addressed by the Second Circuit In *In re Air Crash Disaster of Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir. 1983). Essentially, the Court accepted the premise that the statement *must* provide notice of the limitation in order for the limitation to apply. From this premise, the Court progressed to a determination of "adequate notice." The Second Circuit decided that the "bright line" for "adequacy of notice" should be drawn at the 10-point type requirement found in both the C.A.B. regulation and the

Montreal Agreement. Thus, the 10-point type requirement has been grafted onto the treaty as the next phase in the attempt to circumvent the treaty provision. *In re Air Crash Disaster at Warsaw, Poland, supra*, went so far as to construe the "special contract" that was the Montreal Agreement as part and parcel of the treaty, and indeed, to place that new, "modified" provision just where the courts wanted it to be.

Construing the Article in this way is intended to give it a meaning parallel to that found in American law, but does not accord the treaty provision the meaning evident from the negotiation and debate which led to its promulgation. Nothing in the Montreal Agreement requires that an air carrier provide the statement of liability limitation in 10-point type or lose the benefit of that limitation. Nothing in the debate or dissatisfaction with the limitation which led to the Montreal Agreement confirms the contention that "adequate notice" was an issue. At the core of the debate is dissatisfaction with the very existence of the limitation; the erosion of the circumstances in which carriers may avail themselves of that limitation is the result of judicial frustration at the fact that courts are prevented from fully compensating plaintiffs, especially victims of air tragedies such as presented in this case. This disturbing feature of the treaty has not been eradicated through political process.

While American courts may be justifiably frustrated with the anachronism which the treaty limitation has become, it is not within the province of the judiciary to alter the *quid pro quo* agreed to by the political branches. It has been generally understood that in exchange for virtual strict liability against air carriers, international passengers are limited in their recovery. The "special contract" known as the Montreal Agreement supplemented the *quid pro quo* by raising the amount of the limitation and waiving the carriers' defenses under Article 20 leaving only the presumption of liability. It also

supplemented the Article 3 requirements that a statement be included in the passenger ticket by providing specifics to be provided by carriers stopping in the United States; it did not alter the *quid pro quo* by linking Articles 22 and 20 with Article 3.

In any case, the political branches are vested with the power and authority to make express their intent regarding the enforceability of the treaty limitations in cases where the C.A.B. regulation and Montreal Agreement directive for 10-point type has been violated. However, the United States must be explicit if it is its intent to abrogate the obligation to enforce the treaty limitation in cases such as these Plaintiffs present. The Court notes that were the violation of the regulation for 10-point type and the carrier agreement indeed crucial, a more appropriate sanction would be to prohibit the recalcitrant carriers from engaging in air transportation to or from the United States. While the Government does not have the unilateral power or authority to be rid of the treaty limitation altogether (even the earlier threat of denunciation by the largest participant in international aviation could not accomplish this) the Government could suspend the operating permits of those carriers who do not abide by our domestic laws and regulations. 49 U.S.C. § 1372. The 10-point type size regulation is such a domestic requirement. While the carriers agreed to it in the Montreal Agreement as well, the foreign air carriers are *not* the contracting parties to the treaty. Therefore, Plaintiffs' argument that this carrier was on notice that it would be stripped of limited liability for failing to provide "adequate notice" must fail. While it is indeed correct that the Montreal Agreement must be read in connection with the Warsaw Convention, the resulting Warsaw Montreal system does not include delimiting liability for failure to provide the statement in 10-point type size. In short, the Montreal Agreement may not be read wholesale into the Warsaw Convention.

Although Plaintiffs derive their argument linking the treaty sanction to the statement from case precedent, the basic flaw in their argument is the assumption that the Montreal Agreement can operate as an amendment to the Warsaw Convention; it cannot. Under the Convention's provisions, the carrier and the passenger may agree to a higher limit of liability. While the limit may be raised, nothing in the "special contract" provision allows it to be completely removed. There is nothing in the "special contract" provision which allows the carrier to waive its defenses under Article 20. However, an express, written agreement to waive those defenses, which the Montreal Agreement contains, should be honored by the courts. Waiver by express agreement is not claimed by these Plaintiffs. Defendant Korean Air Lines, having agreed to the Montreal Agreement, has come forward to make an express denial of waiver in these circumstances. Were the Court faced with a clear, political decision to avoid the treaty limitation where there has not been "adequate notice," however defined, or were it faced with an express waiver, as with the Article 20 defenses, then a different decision would be possible.

Putting aside for the moment the question of whether the Montreal Agreement may amend the treaty, the principal concern in adopting the Agreement was the United States' threat to withdraw from the Convention; notice of the limitation's operation was *not* an issue. Where the political branches have been stymied, "judicial treatymaking" to include notice has proved irresistible to some courts. In the view of this Court, treaty revision is not the right or responsibility of the judicial branch. Moreover, the Executive Branch has recognized the continued vitality of the Warsaw Convention. In its *amicus curiae* brief in the *Franklin Mint* case, the United States cautioned against rendering the treaty limitation entirely unenforceable. While not addressing the exact question which faces this Court, the Government brief noted that "The United States remains committed to the

Convention as the basic instrument governing questions of liability in the international aviation industry." *Amicus Curiae* Brief of the United States at 2. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). As the Supreme Court noted in its decision in the case, "when the parties to a treaty continue to assert its vitality a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine on their behalf." *Id.* at 253. Since the branches of Government vested by the Constitution with the power to make and break treaty obligations continue to assert the utility of the Convention, and to assert the enforceability of the treaty limitation, these private citizens may not, indeed the Court may not, define the treaty limitation out of existence, even in narrow circumstances. That task, difficult though it has proven to be, has been assigned to the legislative and executive branches of our Government.

3. Immediate payment of $75,000

In addition to seeking unlimited liability against Korean Air Lines, Plaintiffs have requested an immediate payment of $75,000 as partial damages. Plaintiffs misconceive the nature of the limitation. The $75,000 limitation on air carrier liability is a maximum, not a minimum, on the amount of damages which a plaintiff may receive, *once he has proven his damages*. While the Montreal Agreement subjects air carriers to virtual strict liability, air carriers are not automatically liable for an amount of $75,000. The limitation does not operate as would insurance; Plaintiffs are still required to prove the amount of their damages and are entitled to receive only the amount which they can prove.

Moreover, the nature and amount of unliquidated damages cannot be proved in a motion for summary judgment. Since the amount of damages must be established on an individual basis, there are still material issues of

fact which remain to be tried. Defendant cannot be precluded from conducting discovery with which to defend against Plaintiffs' claims. There being material issues of fact with respect to the amount of individual damages, it would be entirely inappropriate to award the maximum damages. The request for immediate payment of $75,000 must be denied.

CONCLUSION

"Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." *Lisi v. Alitalia-Linee Aeree Italiane*, S.p.A., 370 F.2d at 515 (Moore, J., dissenting). The Montreal Agreement is not a negotiated amendment to the Warsaw Convention. Even if the Agreement could rise to the level of an amendment to the treaty, which it cannot, the principle of law requiring clear expression of the intent of the political branches would prevent a finding that the treaty is to be abrogated. Plaintiffs' construction is not supported by the negotiating history of the Warsaw/Montreal system.

It may be arguable that American courts have been justified in arriving at the conclusion that the Montreal Agreement affects the application of the treaty sanction since the Agreement applies only to transportation including the United States; however, such an interpretation rejects the fact of the clear intransigence of a majority of High Contracting Parties to the Convention with regard to delimiting carrier liability. There is every indication that the majority of the more than 120 nations adhering to the Convention intend to continue the special protection afforded international carriers, even at the expense of international passengers. In light of this intransigence, it is especially inappropriate for the Court to

interpret the treaty provisions in such a way as to relieve the United States of its treaty obligations. In addition, the Montreal Agreement contains no expression of the carriers' intent to waive the limitation. In fact, it makes no mention at all of the sanction to be imposed for a carrier's failure to include proper notice to passengers. Making tolerable an intolerable treaty provision is simply not the province of the courts. Therefore, for the foregoing reasons, the motion for partial summary judgment against Korean Air Lines shall be DENIED.

An appropriate Order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

DATE: July 25, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Civil Action Nos. 83-2793,
83-2941, 83-3154, 83-3177,
83-3204, 83-3441, 83-3445,
83-3448, 83-3449, 83-3450,
83-3451, 83-3452, 83-3453,
83-3454, 83-3455, 83-3456,
83-3457, 83-3458, 83-3459,
83-3460, 83-3461, 83-3462,
83-3463, 83-3464, 83-3465,
83-3466, 83-3467, 83-3468,
83-3469, 83-3470, 83-3473,
83-3474, 83-3587, 83-3588,
83-3792, 83-3793, 83-3889,
83-3891, 83-3898, 83-3901,
83-3902, 83-3903; 84-0029,
84-0030, 84-0402

ORDER

In accordance with the Memorandum entered this date, it is by the Court this 25th day of July, 1985,

ORDERED, that Plaintiffs' Motion for Partial Summary Judgment Against Defendant Korean Air Lines Co., Ltd. is DENIED; and it is

FURTHER ORDERED, that Korean Air Lines Co., Ltd., is entitled to avail itself of the limitation on dam-

ages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and it is

FURTHER ORDERED, that Plaintiffs may not receive immediate payment of $75,000, there being material issues of fact with respect to the amount of unliquidated damages.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

D.H. GINSBURG, *Circuit Judge, concurring*: I join in the court's opinion and add some reflections on the "choice of law" problem in the context of a federal claim transferred under 28 U.S.C. § 1407 from courts in various circuits to a court in another circuit. I write separately to emphasize the practical problems inherent in any resolution of this problem under the statute as written, and to surface preliminarily some ameliorative steps open only to Congress.

I. CONGRESSIONAL INTENT IN SECTION 1407(a)

The problem is simply enough stated. The Second Circuit takes one view of the relevant federal law, this court takes another, and still other circuits have not addressed the question. Cases filed in district courts in the Second Circuit, in this circuit, and in other circuits were consolidated in the district court here for pretrial proceedings under § 1407. On a motion for summary judgment as to all the cases, which view of the applicable federal law is the district court to apply to the cases filed outside this circuit? The New York plaintiffs in this case contend that, under *Van Dusen v. Barrack*,[1] the transferee district court must apply the Second Circuit's interpretation to the cases filed originally in that venue. The court rejects that argument because the *Erie* policies underlying *Van Dusen* do not extend beyond the sta law context of that case.[2] I agree.

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[1] 376 U.S. 612 (1964).

[2] Opinion of the Court, *supra*, at 7. Plaintiffs cite several authorities for the proposition that *Van Dusen* requires a transferee court under section 1407 to apply the case law of the transferor circuit to a transferred case. Plaintiffs' Brief at 7. *See Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 408 n.7 (2d Cir. 1975) ("Since this case was brought in a district court in the Fifth Circuit, the substantive law of that circuit is the law we must consider here."); *In re National Student Marketing Litigation*, 517 F.Supp. 1345, 1346 n.3 (D.D.C. 1981); *In re Haven Industries*, 462 F.2d 172, 179

Quite apart from whether *Van Dusen* is controlling, there are some circumstances in which a federal court is bound to apply the decisions of another circuit, but

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(S.D.N.Y. 1978); *Stirling v. Chemical Bank*, 382 F.Supp. 1146, 1150 n.5 (S.D.N.Y. 1974), *aff'd* 516 F.2d 1396 (2d Cir. 1975); *In re Four Seasons Securities Laws Litigation*, 370 F.Supp. 219, 228 (W.D.Okl. 1974); *In re Plumbing Fixtures Litigation*, 342 F.Supp. 756, 758 (Jud.Pan.Mult.Lit. 1972); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1053, 1055 (E.D.Pa. 1969).

The cursory "analysis" employed in the cases amounts to the following. In *Philadelphia Housing Authority*, the parties did not dispute the proposition, and the court cited *Van Dusen* as authority. The issue was disputed in *Plumbing Fixtures*, but the court relied upon *Van Dusen* and *Philadelphia Housing Authority* without analysis. *National Student Marketing*, *Four Seasons*, and *Stirling v. Chemical Bank* merely bootstrapped on *Plumbing Fixtures*, while *Haven Industries* cited *Plumbing Fixtures* as well as the Second Circuit's decision in *Berry Petroleum* (the only court of appeals decision favorable to the New York plaintiffs) which itself cited both *Plumbing Fixtures* and *Van Dusen* without discussion. That these cases fail to acknowledge the differences between the application of state and federal law was also pointed out *In re Pittsburgh & L.E.R. Co. Securities & Antitrust Litigation*, 543 F.2d 1058, 1065 n.19 (3rd Cir. 1976), which particularly undermines the value of *Philadelphia Housing Authority* as precedent on this point. *Berry Petroleum* is also questionable because it fails to address two prior decisions of the Second Circuit that are in direct conflict with it. *See H.L. Green Co. v. MacMahon*, 312 F.2d 650 (1962), *cert. denied*, 372 U.S. 928 (1963); *Ackert v. Bryan*, 299 F.2d 65, 69-70 (1962); *see also Clayton v. Warlick*, 232 F.2d 699, 706 (4th Cir. 1956); *Scheinbart v. Certain-Teed Products Corp.*, 367 F.Supp. 707 (S.D.N.Y. 1973).

Two other cited cases, *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*, 399 F.Supp. 1106, 1108 (D. Mass. 1975); *In re Air Crash Disaster Near Hanover, New Hampshire*, 314 F.Supp. 62, 63 (Jud.Pan.Mult.Lit. 1970), are inapposite here; like *Van Dusen*, they involved the issue of which *state* law to apply. *See also In re Nucorp Energy Securities Litigation*, 772 F.2d 1486, 1491-92 (9th Cir. 1985);

they are the rare instances where a preclusion doctrine so requires. The doctrines of *res judicata*, collateral estoppel, and law of the case come to mind. The New York plaintiffs do not, and cannot, however, rely upon any of these doctrines to support application of *Polish Airlines* to their transferred cases.

Consequently, the New York plaintiffs' suggestion that transfer under section 1407(a) presents the type of exceptional circumstance that justifies imposing upon a federal court the duty to accept as binding another circuit's interpretation of federal law would constitute a novel departure from the norm of independent judgment. If Congress had intended such a departure, therefore, we should expect to find language in section 1407(a) that mandates, or at least suggests, it. Obviously, Congress could have directed transferee courts to apply the case law of the transferor court. Less directly, Congress could have suggested this practice by transforming the transferee judge into a temporary judge of each transferor court for the purposes of deciding the transferred cases.[5]

In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. 307, 315-16 (S.D.Fla. 1986). Judge Weigel cited the federal and state law cases together as supporting the proposition that "the transferee court must apply the substantive law of the transferor forum." Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 584 (1978). *See also* Manual for Complex Litigation, Second § 31.122 at 254 n.25 (1985) ("The transferee judge is bound . . . by the law that would apply in the transferor court, even if the case is later transferred to the transferee court under 28 U.S.C. § 1404").

[5] Congress took this type of approach in Section 1407(b) in apparent recognition that transferee judges, because they often preside over cases from far-flung transferor courts, would of necessity have to perform in unfamiliar roles. In section 1407(b), Congress authorized transferee judges to

We find no such language in section 1407(a), however.[4] Instead, the transfer scheme contemplates that a transferee court will adjudicate transferred cases no differently than cases originally filed before it. This is apparent throughout the scheme, from the point of transfer to the final disposition of the case. Rather than confine the transferee judge merely to presiding over the pretrial phase of cases that may be resolved finally in the transferor courts, section 1407(a) transfers jurisdiction over whole cases to the transferee court; upon transfer, the transferor courts retain no jurisdiction whatsoever.[6]

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order pretrial depositions outside of their normal jurisdiction. As we determined *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 880-881 (D.C. Cir. 1981), however, it did so by making the transferee judge, for that purpose, a "temporary judge" of the district court for the district in which the deposition is taken. Congress seemingly could have drafted section 1407(a) also to transform the transferee judge into a judge of each transferor court for purposes of deciding the cases transferred from that court. (Such an approach would still preserve the efficiencies of requiring only one federal judge to become versed in the facts of a controversy.) If Congress also provided for transferor circuit review of such cases, then we might conclude that Congress' intent under such a version of section 1407(a) was for the case law of the transferor court to govern the transferred case.

[4] Section 1407(a) was enacted in 1968, and its legislative history indicates that *Van Dusen*, decided four years earlier, would apply in the pretrial context. *See* Opinion for the Court, *supra*, at n.5. There is no indication, however, that Congress believed that *Van Dusen* extended beyond its own context of federal courts applying state law.

[6] *See Glasstech, Inc. v. AB Kyro OY*, 769 F.2d 1574 (Fed. Cir. 1985); *Astarte Shipping v. Allied Steel & Export Service*, 767 F.2d 86, 87 (5th Cir. 1985); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, 118 (6th Cir. 1981); *General Elec. Co. v. Byrne*, 611 F.2d 670, 673 (7th Cir. 1979); *In re FMC Corp. Patent Litigation*, 422 F.Supp. 1163, 1165 (Jud.Pa.Mult.Lit. 1976). *Cf. Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc) (transfer under section 1404(a)).

Indeed, Congress contemplated that transferred cases might never return to the transferor courts, but instead might be settled or resolved by summary judgment in the transferee court,[6] or else transferred under section 1404(a) to that same transferee court for joint trial.[7] In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts.[8] Finally, during the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not to the courts of appeals for the transferor circuits.[9] I can

[6] *See* Weigel, *supra* note 2, 78 F.R.D. at 582-83; *Pfizer Inc. v. International Rectifier Inc.*, 538 F.2d 180 (8th Cir.), *cert. denied*, 429 U.S. 1040 (1976); *Humphreys v. Tann*, 487 F.2d 666, 668 (6th Cir. 1973), *cert. denied*, 416 U.S. 966 (1974); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom. Standard Oil Co. v. Alaska*, 415 U.S. 919 (1974); *Reidinger v. Trans World Airlines, Inc.*, 463 F.2d 1017, 1018 n.2 (6th Cir. 1972).

[7] *See, e.g., In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 479 F.Supp. 1118, 1121-22 (E.D.N.Y. 1978), and cases cited; *In re Yarn Processing Patent Validity Litigation*, 472 F.Supp. 174 (S.D.Fla. 1979); *In re Antibiotic Actions*, 333 F.Supp. 299 (S.D.N.Y. 1971).

[8] *See* Weigel, *supra* note 2, 78 F.R.D. at 583, which reports that less than 5 percent of transferred cases return to the transferor courts. More recent statistics indicate that the number may now approximate 25 percent. *See* 1986 Ann.Rep. Director Admin.Off. U.S. Courts 128; Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U.Pa.L.Rev. 595, 700 (1987).

[9] *See Corrugated Container*, 662 F.2d at 88; *Glasstech, Inc. v. AB Kyro OY*, 769 F.2d at 1576-78; *Astarte Shipping v. Allied Steel & Export Service*, 767 F.2d at 87. In a number of other decisions, *see, e.g., Gulf Oil Co. v. Copp Paving Co.*, 419 U.S. 186 (1974), as well as the cases cited *supra* note 6, the authority of the transferee circuit to review a transferee district court's order was assumed *sub silentio*.

see no indication, from the outline of this scheme, that Congress intended for transferee courts to apply to each transferred case the case law of the transferor court, nor any reason why it would so intend.

Before concluding, based on the lack of any evidence to the contrary, that Congress did not intend transferee federal courts to depart from the norm of independent judgment on matters of federal law, one final inquiry is necessary. For we should still hesitate to adhere to that norm if doing so would, for some other reason, frustrate the purpose of section 1407(a) "to promote the just and efficient conduct" of multidistrict actions, and part by "eliminat[ing] the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts."[10]

In order to discern whether the norm of independent judgment would have this result, we may assess its operation in the instant case. To recapitulate the procedural facts a bit, cases from district courts in the First, Second, and Sixth Circuits were transferred to the District Court for the District of Columbia for pretrial proceedings to be conducted jointly with cases filed here. KAL then filed a motion for summary judgment on the issue of damages, arguing that the Warsaw Convention imposed a maximum no-fault liability of $75,000 per passenger. When the motion was filed, only the Second Circuit had spoken on the pertinent question, holding in *Polish Airlines*[11] that an airline that does not give passengers tickets with 10-point type loses the protection

[10] *In re Plumbing Fixtures Cases*, 298 F.Supp. 484, 491-92 (Jud.Pan.Mult.Lit. 1968).

[11] *In re Air Crash Disaster at Warsaw Poland*, 705 F.2d 85 (2d Cir.), *cert. denied sub nom. Polskie Linie Lotnicze v. Robles*, 464 U.S. 845, *reh. denied*, 464 U.S. 978 (1983), *subsequent proceedings*, 748 F.2d 94 (2d Cir. 1984), on appeal after remand, *Harris v. Polskie Linie Lotnicze*, No. 86-2323 slip op. (9th Cir. June 22, 1987).

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of the damage ceiling. The other circuits, in particular the District of Columbia, First, and Sixth Circuits, had not yet addressed the issue.[12] Analyzing the Convention for himself, Chief Judge Robinson concluded that *Polish Airlines* was wrongly decided: noncompliance with the "10-point type" rule does not remove the ceiling.

Adhering to the norm of independent judgment, Chief Judge Robinson also determined that his ruling should apply to all of the cases before him, not only to those originally filed here. At least in the first instance, such uniform application of his ruling furthers considerably the efficiency and consistency goals of section 1407(a). All the cases will be governed by one rule as to damages, and they will all proceed in a like direction, rather than being bifurcated into two groups of cases with diverging litigation paths.

The only problem that does seem potentially to arise from this approach involves the eventual appellate review of Chief Judge Robinson's ruling on the Convention. Assuming for the purposes of illustration that interlocutory appeal to this court had not been granted and, furthermore, that the cases would not subsequently terminate for one or another reason in this circuit, then the transferred cases would return to the respective transferor courts for trial. The several courts of appeals, either on interlocutory appeal or on appeal of the final judgment, would in all probability review the course of pretrial proceedings, including Chief Judge Robinson's potentially outcome-determinative ruling on the Conven-

[12] Subsequent to the district court's grant of summary judgment in this case, the Fifth Circuit adopted the *Polish Airlines* rule. *See In re Air Crash Near New Orleans, Louisiana*, 789 F.2d 1092, 1098, *vacated*, 795 F.2d 381 (1986), *aff'd in relevant part*, 821 F.2d 1147 (1987) (*en banc*). As the district court's opinion in this case was not then published, however, the Fifth Circuit discussed only the Second Circuit's decision.

tion. Reversal would be most likely to occur, of course, in the Second Circuit, where his ruling would conflict directly with *Polish Airlines*.

Since this court would still review the cases filed in the District of Columbia, and as confirmed by the court today we do not agree with the *Polish Airlines* decision, the results on appeal would lead to two (or depending upon the views of the First and Sixth Circuits, perhaps more) different holdings on a determinative issue of damages.[13] A series of inconsistent appellate judgments is not a desirable outcome, however, particularly since the result in some cases might be to require renewed pretrial or trial proceedings. This whole course of case development, starting with divergent paths of appeal and ending with either conflicting or duplicative results, would clearly frustrate the primary goals of section 1407(a) "to promote the just and efficient conduct" of multidistrict actions.

Having a transferee court apply the norm of independent judgment in ruling on transferred cases, therefore, does pose some risk of undermining on appeal the interests served by section 1407(a). The question is therefore whether this potential risk is great enough to frustrate Congress' remedial intent in enacting section 1407(a), and thereby to persuade us that transferee courts must abandon the norm of independent judgment in deciding transferred cases. In this regard, I believe that, although there is some risk of cases unraveling upon review by transferor circuits, it is not significant. First, relatively few cases ever return to the transferor courts.[14] Second, most transferee court rulings will not be outcome-deter-

[13] In other situations, the disputed issue may involve liability.

[14] *See supra* note 8. Of course, fewer cases would be settled and more would return to their transferor courts if the other circuits show themselves ready to reverse transferee courts' pretrial rulings, thus inviting such encore appearances.

minative, but instead will involve routine matters, such as discovery orders, that will not provide grounds for a transferor circuit court to reverse a pretrial ruling by the transferee district court.

Third, as to those few outcome-determinative rulings of the transferee district court, there exists the possibility of interlocutory appeal to the transferee court, pursuant to 28 U.S.C. 1292(b), as indeed occurred in this case. If the transferee circuit reviews such a ruling, it of course would also exercise independent judgment and apply its own precedents rather than those of the transferor circuits. By reviewing the ruling, the transferee circuit probably will have insured that, if the cases are retransfered to the transferor courts, they will not unravel on later appeal. That is because, in contrast to the rulings of the district court under review, the interlocutory decisions of a coordinate court of appeals are likely to be accepted as binding, under the doctrine of law of the case, in the courts of appeals reviewing the final decision of the district court.[15] I therefore believe

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[15] No decision of this court has directly resolved the question of how courts should apply the law of the case doctrine after a case is transferred back to a transferor court. *See Int'l Union, UAW v. Donovan*, 756 F.2d 162, 165 n.16 (D.C. Cir. 1985); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1082-83 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985); *McCandless v. Beech Aircraft Co.*, 697 F.2d 1156 (D.C. Cir. 1983). Our precedents do suggest, however, that the transferor circuit should not disturb the transferee circuit ruling. In *Laffey*, we held that the law of the case doctrine precludes—absent clear error or manifest injustice—our reviewing, on appeal from a final judgment, a previous ruling of this court rendered on interlocutory appeal. The next question is whether the fact of transfer, and the resulting lack of identity of the two appellate courts, would alter our conclusion that an interlocutory appellate ruling is law of the case for the purpose of a subsequent appeal. *Donovan* would seem to reject this possibility by holding that, in the context of a transfer for lack of jurisdiction, the transferee court should not reexamine

that if (1) transferee circuits are receptive to interlocutory appeals involving outcome-determinative rulings by a transferee district court—again, as occurred in this

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the ruling of a transferor court of *coordinate* jurisdiction absent exceptional circumstances. In fact, this principle has been stated by other circuits. *See Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir.), *cert. denied*, 106 S.Ct. 230 (1985); *Central Soya Co., Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169 (3rd Cir. 1982); *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 558 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976). *See also Sentner v. Amtrak*, 540 F.Supp. 557, 558-59 n.3 (D.N.J. 1982); Steinman, *supra note* 73, 135 U.Pa.L.Rev. at 702-03 & n.417; Weigel, *supra* note 5, 78 F.R.D. at 577.

While a transferor court of appeals might disagree with the transferee circuit's reading of the law, there is good reason in this context to accept a reasoned opinion as presenting something less than the clear error or exceptional circumstance that warrant departing from the law of the case doctrine. Chief Judge Robinson well put the case for transferor courts giving preclusive effect to rulings of a transferee court: "if transferor courts were free to readjudicate issues determined by transferee courts, transfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate." *In re Korean Air Lines Disaster of September 1, 1983*, MDL 565, Civ. No. 83-0345, Order on Remand at 5 (May 7, 1987).

See also In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981) ("Proper coordination of complex litigation may be frustrated if other courts do not follow the lead of the transferee court."). *Multi-Piece Rim Products* did not directly address the situation discussed in the text. Instead, it involved whether a pre-transfer order of a transferor district court had preclusive effect, as law of the case, on a transferee district court. *Cf. Blaski v. Hoffman*, 260 F.2d 317, 322 (7th Cir. 1958), *aff'd*, 363 U.S. 335 (1960) (the transferee Seventh Circuit refused to abide by the "erroneous" jurisdictional ruling of the transferor Fifth Circuit; the Supreme Court adopted the Seventh Circuit's view of the merits, but the law of the case issue was not raised to the court, although in *dictum* it suggested that, because the ruling involved the Seventh Circuit's jurisdiction, it would

case as well as in *Polish Airlines*[16]; and if (2) transferor circuits are receptive, on appeal after retransfer, to the law of the case as it was decided in the transferee circuit court, then even a continuing disagreement between the transferee and transferor circuits on the certified issue need not cause particular cases in a multidistrict litigation to come unglued.

As a result, any harm to the interests Congress meant to further in section 1407(a) will be limited to those outcome-determinative rulings of a transferee district court that are not the subject of an interlocutory appeal in the transferee circuit, and, assuming that the cases are transferred back to the transferor courts, result in reversals by one or more transferor circuit courts.[17] Whether this harm, which seems likely to be insignificant, is nevertheless great enough that transferee district courts must abandon the norm of independent judgment,

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not be bound by the Fifth Circuit's ruling on that point, 363 U.S. at 340 & n.9); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, at 118-20 (6th Cir. 1981); *In re Long Distance Telecommunication Litigation*, 612 F.Supp. 892, 900-03 (E.D.Mich. 1985).

[16] *Polish Airlines*, 705 F.2d at 86 n.2 (a second interlocutory appeal followed—*see* 748 F.2d at 94-95). *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 192; *In re Western Liquid Asphalt Cases*, 487 F.2d at 192-93; *In re Air Disaster at John F. Kennedy International Airport*, 479 F.Supp. at 1124-29, and cases there cited.

[17] This harm would be further minimized if transferor circuit courts required, as a condition of reviewing a ruling by the transferee district court, that the appellant at least have sought interlocutory appellate review of that ruling while in the transferee circuit. This rule is comparable to that under which an appellate court will decline to reach an issue not raised before the trial court, *see District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984), and the institutional interests served are similar. In each instance, the rule requires the litigant to raise an issue at a particular stage in the litigation in order to prevent the litigant from, in

depends upon the probable effects of the alternative rule, under which the transferee district court would apply what it believes would be the interpretations of the respective transferor courts.[18] Again, the facts of this case are illustrative.

Under that alternative, Chief Judge Robinson, having determined that KAL's issuance of 8-point type tickets did not remove the limitation on damages provided under the Convention, would then have to determine the scope of his ruling. Certainly it would govern the cases filed in this district originally; no one disputes that proposition. Under the New York plaintiffs' argument, however, the ruling should not govern their cases, because *Polish Airlines* clearly dictates the contrary interpretation of the Convention.

When applied only to the District of Columbia and New York cases, adherence to the case law of the transferor circuit would be a fairly easy procedure for the transferee district court. It is almost a certainty, however, that the bifurcated ruling it produces would place the District of Columbia and New York cases on increas-

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effect, confronting the court on appeal with an issue that has not been sorted out by a court of first instance, thereby creating "'[e]normous confusion and interminable delay.'" *Id.* at 1084, *quoting Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1947). In the transfer context, this suggestion would deprive parties who lose before the transferee district court, and anticipate losing as well before the transferee circuit court, of the incentive to avoid interlocutory appeal and to forestall settlement in the hope of having the case retransferred to the circuit whose more favorable case law renders appellate success more likely.

[18] If transferor circuit law were applicable, the transferee district court might also remand the case to the respective transferor districts for resolution of an issue. Depending upon the issue and its disposition, retransfer (even after interlocutory appeal in the transferor circuit) might be in order. The cost and delay of proceeding in this manner undercuts, however, Congress' purpose in enacting section 1407.

ingly divergent courses. The District of Columbia plaintiffs, in conducting discovery, will have to pursue evidence of fault on the part of KAL, whereas the New York plaintiffs would be able to recover without such a showing. The entire course of discovery, and thus the motions that come before Chief Judge Robinson, would differ entirely between what would have become, in effect, two separate groups of consolidated cases. These differences would be further magnified by the vastly different incentives for settlement facing the two groups of plaintiffs. The District of Columbia plaintiffs, having to prove fault, will presumably be more amenable to settlement than would be the New York plaintiffs. All in all, therefore, it is unlikely that the bifurcated ruling would preserve, to any significant extent, either the efficiency or the consistency that section 1407(a) was intended to promote.

Under the New York plaintiffs' rule, therefore, the threat that the Second Circuit would reverse Chief Judge Robinson and thereby unravel the New York cases is averted, in effect, by preemptively unraveling them in the transferee court. This seems to be a high price to pay—a virtual abandonment of the efficiency and consistency goals of section 1407(a)—to protect against a threat, i.e. unraveling in the transferor circuit courts, that could instead be avoided, at no cost to consistency and at a much lower cost in efficiency, through interlocutory appeal to the transferee circuit court and subsequent application by the transferor circuit of the law of the case doctrine.

The price that must be paid in abandoning the norm of independent judgment, however, looms even larger when one realizes that the New York plaintiffs have presented us with the deceptively easy alternative by applying *Polish Airlines* to the New York cases, without suggesting to us how the district judge should have ruled with respect to the cases from districts in the First and

Sixth Circuits, which have not decided this issue.[19] In attempting to rule as would a district court in those circuits, he could have simply applied his own ruling to those cases, happy to believe that, if called upon, those circuits would see things his way. Or, taking to heart the New York plaintiffs' contention that, under *Van Dusen*, transfer should result in merely "a change of courtrooms,"[20] he could have seriously attempted to divine how the First and Sixth Circuits might interpret the Convention if called upon to do so.

This enterprise is far more problematic than *Erie*'s familiar requirement that a federal court assume the perspective of the highest court in each transferor state, and anticipate how each one of those courts would decide an issue of state law. As to some *Erie* issues, the transferor states will have significantly different laws; as to others, such as those addressed by the sundry and not entirely "uniform" codes adopted by the several states, there may be only subtle differences, difficult to discern, among them. Regardless of the difficulty, however, the duty of the transferee court under *Van Dusen* and *Erie* is simply to arrive at what it, in good faith, believes to be an accurate statement of each state's law, as applied to the facts before it. When this results in the transferee court rendering different judgments in cases transferred

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[19] We see nothing in section 1407(a) that would justify a transferee court in applying transferor precedent when it is clear, as is *Polish Airlines* in the Second Circuit, but not trying to discern what other transferor circuits would decide when their case law is not as clear on the precise point in question but offers some guidance. Introducing such a distinction would constitute an act of legislation appropriate for Congress, not of interpretation of the existing statute by a court. Hence, either a transferee court must apply its own interpretation of federal law to all transferred cases, or it must attempt to apply what it believes to be each transferor court's probable interpretation. There is no middle road.

[20] 376 U.S. at 639.

from different fora, therefore, it is only because the states in question have exercised their undoubted "right to pursue local policies diverging from those of [their] neighbors." [31]

When we turn to questions involving federal law, the transferee judge's task becomes much more difficult, because here the court deals with a single federal law that can ultimately have only one proper interpretation. For example, in the instant case, a violation of the "10-point type" rule cannot both impose *and* not impose unlimited liability under the Warsaw Convention; either the Second Circuit or we have interpreted it erroneously.[32] As a result, any attempt by Chief Judge Robinson to predict how the First and Sixth Circuits would interpret the Warsaw Convention on this precise point would necessitate casuistical musings concerning whether another circuit's case law might be read to compel, or even perhaps just to suggest, an interpretation in conflict with his.[33] Such intellectual practices fall within the domain of the sophist, not that of the judge.

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[31] *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941).

[32] Albeit not necessarily "clearly erroneous" for purposes of the law of the case doctrine. *See* note 15, *supra*.

[33] *See* Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677, 713-14 (1984). For the federal-law transfer situation to be analogous to what occurs under *Van Dusen*, in which the federal court assumes the perspective of the transferor state's highest court (i.e. of the supreme interpreter of the state's law), the question in the KAL case would *not* be (as the New York plaintiffs suggest it is)—"how would the other federal circuits interpret the Warsaw Convention?" Rather, the analogous question would be the same one that a circuit court normally poses when addressing an issue of federal law—"how would the U.S. Supreme Court (the supreme interpreter of federal law) interpret the Warsaw Convention?"

The practice suggested by the New York plaintiffs, therefore, differs qualitatively from accepted instances in which a federal court must apply the ruling of another court. Under the preclusion doctrines of res judicata, collateral estoppel, and the law of the case, a court applies a known ruling of another court—usually to the very facts from which it arose. Under the New York plaintiffs' suggestion, however, the transferee district court will often have to engage in pure guesswork in order to apply another circuit's precedents, if any there be, to the unique facts before it. In this respect, they propose a practice that is unprecedented in the context of federal courts interpreting federal law. Furthermore, when the transferee district court will not be able to rely on a decision on point, there is no assurance, try as it might, that it will always be able correctly to predict how an undecided transferor circuit will eventually decide the kind of close issue over which circuits tend to split. As a result, even though abandonment of the norm of independent judgment appears at first glance to provide a way to prevent cases from unraveling after returning to the transferor courts, the effectiveness of that course might be quite limited, in this case perhaps only to the New York cases.

I have undertaken to assess the implications of applying alternative interpretive models—the exercise of independent judgment versus the application of transferor court case law—in order to determine whether, although congressional silence would generally counsel us against doing so, we should nevertheless break with practice by having transferee courts apply transferor circuit case law. Such a break, as I indicated, would be justified only if the exercise of independent judgment would frustrate Congress' remedial purposes in enacting section 1407(a). The analysis of these alternatives, however, tends to confirm that we should adhere to existing practice. The purposes of section 1407(a) would more likely be frustrated,

not when a transferee district court exercises independent judgment, but rather when it attempts to anticipate the various transferor courts.[24]

Section 1407(a) was enacted "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts."[25] Under the New York plaintiffs' rule, however, transfer under section 1407(a) will simply yield "conflicting contemporaneous pretrial rulings" by one judge rather than by many. The transferee judge, on the most insignificant as well as outcome-determinative rulings, will have to wonder whether he or she would rule differently if located instead in one of the transferor circuits. No doubt, a considerable amount of the judge's time will be consumed attempting to determine whether litigants accurately describe differences in other circuits' interpretations of federal law. And, if the judge is persuaded that some difference does or *may* exist, it will be no small task to explain the inconsistent and contradictory rulings.

The conduct of multidistrict litigation, which is invariably time consuming as it is, will grind to a standstill while transferee judges read separate briefs, each based on the case law of a transferor circuit, on a single issue of federal law. Much of the advantage that transfer was intended to produce, and particularly the desiderata of furthering efficiency and preventing inconsistent rulings, will be lost by requiring transferee judges to wear a number of judicial hats. It is the prospect of this kind of quagmire that is likely to yield the result feared by the Court in *Van Dusen*—that courts would be "reluctant to grant transfers" and thereby "frustrate the remedial

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[24] *A fortiori*, when it throws up its hands and remands the cases to the transferor courts for determination of the issue. *See* note 18, *supra*.

[25] *In re Plumbing Fixtures Cases*, 298 F.Supp. at 491-92.

purposes of [section 1407]."[26] It may well be preferable to have multidistrict litigation remain dispersed in the courts of origin than to have transferee judges burdened with the hopelessly complex task of sitting as several federal judges at once.[27] Consequently, even though having transferee judges exercise independent judgment may in isolated instances result in an unraveling of a transferred case, I believe that this approach, although not a perfect solution, is by far the less problematic and the more consistent with the intent of Congress in enacting section 1407.

II. Beyond Interpretation

Under section 1407(a), cases involving federal law are transferred from one circuit to another, and are conceivably subject to appellate review in several circuits, at various stages in the litigation. Given these facts, any resolution of the problem of whose case law will be applied entails, under the statute as currently written, some cost in efficiency and consistency; losses are truly unavoidable. They may be minimized, however, and that is why I reject the New York plaintiffs' suggestion, which in addition to exacting a much higher cost also requires federal courts, in the absence of any congressional mandate, to depart completely from the accepted norm of indepenednt circuit interpretation.

In order for cases to be transferred from one circuit to another with a minimum loss of efficiency and con-

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[26] *Van Dusen*, 376 U.S. at 636.

[27] This is particularly the case insofar as the rule applicable to transferee judges under section 1407(a) is applied as well in the analogous context of a transfer under section 1404(a). The prospect of a trial presided over by a judge expected to simulate different district courts throughout as many as twelve circuits is likely to discourage any court from ordering transfer under section 1404(a).

sistency, the only solution is for Congress to amend section 1407(a), as well as section 1404(a),[28] to provide that rulings by a court in one circuit will not be reviewed under the case law of another circuit. In this respect, the options seem to be: (1) adopt the New York plaintiffs' position, and have the law of the transferor court govern a transferred case throughout its disposition; (2) provide that a ruling in a transferred case is to be reviewed, by whatever circuit court, under the case law of the circuit in which the ruling was made; and (3) make transfer comprehensive, extending through trial and appeal in the transferee circuit (applying its transfer circuit precedents, of course). For the reasons I have given, the first option involves considerable costs. Because the transferee court will have to treat cases from different circuits differently, this alternative virtually guarantees the sacrifice of the efficiency and consistency gains that were supposed to result from conducting consolidated pretrial proceedings. Furthermore, it places the transferee district court in the almost impossible position of determining whether courts of appeals in other circuits would disagree in interpreting federal law.

The second option appears to be far more advantageous. Under this scheme, the transferee district court applies its circuit case law—which it knows best—and its own best judgment to all the transferred cases. By treating all the cases similarly, the statutory goals of efficiency and consistency would be immediately furthered. In addition, the risk that these goals would be undermined by a later unraveling of the cases in the transferor courts is substantially lessened. In reviewing a transferee district court's ruling, the transferor circuit courts would all apply the transferee circuit's case law, and in conducting this review they would be aided by the

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[28] *See* note 27, *supra*.

opinion of the transferee district court.[29] (The transferor circuit courts would thus be placed in a far more advantageous position than is the transferee district court under the New York plaintiffs' suggestion, which would often have to engage in pure guesswork, entirely without guidance about how a court in another circuit would rule.) Furthermore, transferor circuit courts are far less likely to reach conflicting conclusions if they all interpret transferee circuit case law than if they each exercise independent judgment. Consequently, unraveling is not likely to occur under this rule.

The second option is also more attractive because it involves a lesser departure from the norm of independent judgment. Whereas a transferee district judge must make frequent rulings, few cases ever return to the transferor courts and—unlike the first option—the second option would not create any greater incentive for a litigant to persist until the case is remanded. Moreover, in only a few of those that do return will the transferor circuit court have to review a ruling of the transferee district judge on an issue of federal law that will create disagreement among the circuits and thereby require the transferor circuit court, in applying transferee circuit case law, to issue a decision that does not reflect its own view.[30]

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[29] It may also be that the transferor circuit courts should afford some deference to the transferee district court's application of transferee circuit case law. *Cf. Bishop v. Wood*, 426 U.S. 341, 345-346 & n.10 (1976); *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 121 (D.C. Cir. 1986); *Hull v. Eaton*, No. 85-6024 slip. op. at 11-12 n.9 (D.C. Cir. August 4, 1987).

[30] In fact, the litigation that followed the Second Circuit's ruling in *Polish Airlines* illustrates this. As indicated above, *supra* note 16 and accompanying text, *Polish Airlines* was decided on interlocutory appeal from a ruling by the transferee district court. After pretrial proceedings were complete, the cases were remanded to the transferor courts for trial. On appeal from one of these trials, the Ninth Circuit

The third option entails all of the benefits of efficiency and consistency and none of the drawbacks of the second option. Insofar as transfer is burdensome for plaintiffs, however, it would tend to magnify their hardship, especially if they are to testify at trial. This detriment may be more or less offset by the reciprocal advantage accruing to a defendant that does not have to defend multiple trials at different places. A risk-averse defendant, on the other hand, might value the diversification of risk attendant to multiple trials, rather than having everything depend—even more than it already does as a result of the relaxation of the mutuality requirement for plaintiffs' use of estoppel—upon the fortuities of a single proceeding. As between the second and third options, therefore, considerable study would be needed in order to make an informed judgment, one that balances the goals of judicial economy and consistency against the distribution of costs imposed on plaintiffs and defendants in the course of realizing those goals.

III. Conclusion

As a court, however, we must address the statute as it is, not as it might be. Nothing in the Supreme Court's opinion in *Van Dusen* nor in the language of section 1407(a) requires a federal court to engage in the unprecedented practice of interpreting federal law through the analytical prism of another circuit's case law. The

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held that calculation of damages was governed by the law of Poland, not that of California. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1080 (9th Cir. 1987). Accordingly, the plaintiffs received $76,399.78 in damages, $10,000 less than they would have received under California law. Given this disposition, it is not surprising that the Ninth Circuit merely mentions the Second Circuit's holding in passing, *id.*, slip op. at 4, since the question of whether the Convention's $75,000 damage litigation applied had become all but irrelevant.

New York plaintiffs have not shown, nor can I imagine, how the purposes underlying section 1407(a) would be furthered rather than frustrated by that approach. Under these circumstances, I can see no reason to condemn transferee district courts to perform often futile exercises in mental gymnastics.

Accordingly, I reject the New York plaintiffs' argument and join the court's opinion holding that our interpretation of the Warsaw Convention must be applied to all the cases before us.

Judgment of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Misc. No. 83-00345

No. 85-5982

IN RE: Korean Air Lines Disaster of September 1, 1983

Plaintiff's Steering Committee,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

RUTH B. GINSBURG, WILLIAMS, and D.H. GINSBURG,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ GEORGE A. FISHER

George A. Fisher
Clerk

Date: September 25, 1987

Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg.

Concurring opinion filed by Circuit Judge D.H. Ginsburg, in which Circuit Judge Williams joins.

Order of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Misc. No. 83-00345

No. 85-5982

[stamped Nov. 16, 1987]

IN RE: Korean Air Lines Disaster of September 1, 1983.

Plaintiffs' Steering Committee,

Appellant.

Before:

Wald, *Chief Judge*; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, *Circuit Judges*.

ORDER

The petition of Plaintiffs' Steering Committee for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the petition for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, Clerk

BY:/s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk